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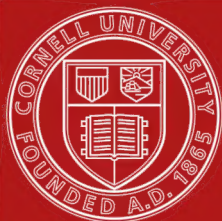
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**A treatise on the law of real property,**



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A TREATISE  
ON  
THE LAW OF REAL PROPERTY



A TREATISE  
ON THE  
LAW OF REAL PROPERTY

BY  
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THE LAW SCHOOL OF BOSTON UNIVERSITY

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## PREFACE

THE author was for seventeen years a lecturer upon the law of real property, and for the major part of that time a professor, teaching that subject in the Law School of Boston University. He hopes that this long experience in dealing with that department of law will be a sufficient apology for his offering this book to the public. It will be found that up to the last few chapters the book is climacteric. The effort is made to lead the reader up the steps of a ladder, and cross references are freely made, so that he may collocate in his mind a proposition he has already learned in some previous chapter, with some other proposition in the later chapter, and thus the reader is helped to think of the two propositions together, although they are required to be stated in the order in which they are presented. It is evident from this statement that the book is intended to be useful to students of law who are undertaking the study of real property. But it is hoped that the book will be found useful to the practitioner, and that it may not be unworthy of the attention even of members of the courts.

FRANK GOODWIN.

FEBRUARY 1, 1905.



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# A TREATISE

## ON

### THE LAW OF REAL PROPERTY.

#### CHAPTER I.

##### INTRODUCTORY.

THE subject of Real Property concerns rights in land, but all rights in land are not real property. Familiar practical illustrations are the title of a mortgagee of real estate, and of a tenant for years. You mortgage your house, and the man who lends you the money, and secures it by the mortgage deed which you deliver him, owns not real estate, but his title is personal property. You lease your house to me for five years or any other definite time, and though I go into possession and occupy, my title is personal property. Still almost all interests in land are real property.

Real property is not divided into three divisions, but is looked at from three points of view, as lands, tenements, and hereditaments.

The word "land" or "lands" comprehends the soil of the earth, and everything upward to the skies and downward to the depths below. The word therefore comprises trees and mines and buildings.<sup>1</sup> There is only one case in law in which water in its natural state is the subject of ownership, and that is the

<sup>1</sup> 2 Black. Com. 15-19. If one house overhangs another, no right exists beyond the space included within the walls of the overhanging part; so that its owner has no right to raise the overhanging part, because the space *usque ad cælum* belongs to the overhung premises. *Laybourn v. Gridley* (1892), 2 Ch. 59; *Corbett v. Hill*, 9 Eq. 671.

case of percolating water. Percolating water is water which filters beneath the surface of the earth and has no defined natural channel. A man is regarded as owning the percolating water while it is in his land. But other water in its natural state is subject only to the use of the man through whose land it flows. He has a right to its use, but is not regarded as having the title.<sup>1</sup>

Next as to hereditaments. A hereditament is a right which may be inherited. Upon the death of the owner it passes by operation of common law to the heir, while the title to personal property technically vests in the administrator. Hereditaments are of two classes, corporeal and incorporeal. A common understanding of the corporeal hereditament is that it is the same as land already defined, while the incorporeal hereditament is looked upon as a right of a certain sort in land, and being a mere right is spoken of as being invisible and intangible, as if you could touch and see the corporeal hereditament but could have no knowledge through the senses of the incorporeal hereditament. We shall see very soon that this is not a sound distinction, for that our notion of property is a contemplation of rights so that the corporeal hereditament comprises one class of rights in land and the incorporeal hereditament a different class of rights in land.

As to tenements, strictly speaking, these are rights in land which may be "held" or "holden." These two words are technical, and can only be comprehended by one who has some understanding of the feudal system. It is evident that the word "tenement" is derived from the Latin word which signifies to hold, but the word "tenement" is used by us every day in a sense much broader than this technical sense, and even in a very remote period of English legal history we find the word used in a very general way.

It is convenient now in order to elucidate the technical meaning of the above words "held" or "holden" to give some

<sup>1</sup> 2 Black. Com. 17-19.



account of the feudal system. The subject is a vast one. We will begin now by throwing some light upon it. The feudal system was a development of the Middle Ages. The better opinion is that the Saxons of England did not have what is now understood as the feudal system. They had what we may call dependent land ownership. But it did not contain the essential ingredients of the feudal system.<sup>1</sup> The feudal system had developed to a complex degree in France even earlier than the Norman Conquest achieved by William the Conqueror in the year 1066, and the Conqueror brought this system to England and planted it there, where it developed yet more. The theory of the Conqueror—that is, of the lawyers under his reign—was that the king actually owned all the land of England, and those persons who got title to land derived it either under him or at least by his sanction.<sup>2</sup>

Suppose, then, that we think of the King of England as making a grant of land to A. A is said to hold under the king. A makes a grant of land to B. B holds immediately of A, mediately of the king. There were great reciprocal obligations under feudalism involved in this transfer of land, and the system of holding land with the incidents attached constitutes the feudal system. The king is called lord paramount. A is called his vassal or tenant. B holding under A is his vassal or tenant, and A, though a vassal to the king, is lord of B. The relation between A and B is called subinfeudation. Just as A owed certain services to the king, so B owed certain services to A. We shall soon see that A sometimes in conferring land upon B did not retain any right in himself, in which case we do not have subinfeudation, but have what is called substitution or outright alienation. In such a case B would hold immediately of the king. Now the rela-

<sup>1</sup> But there is evidence which indicates that there had been a tendency in England toward feudalism even before the Conquest. Vinogradoff on Villainage in England, 133.

<sup>2</sup> 2 Hallam's Middle Ages, 299, 300 (Boston ed. 1861); 1 Wash. R. P. 27; 2 Black. Com. 104, 106.

tion between these persons was called "tenure." There were several sorts of tenure, the chief of which we will mention later.

The property of the vassal was called a "feud," "fief," or "fee," and we have this word "fee" in every-day use in this country and in England. It has sometimes been defined as the right to hold.<sup>1</sup>

It is an interesting question, where did the property reside in the case of the creation of one of these feuds, fiefs, or fees? Did it reside in the grantor, the lord; or did it reside in the grantee, the vassal? It is perhaps a question rather of words than of substance, provided that we are acquainted with the nature of the relation between the two parties. The words "feud," "fief," or "fee" (*fædum*) are in their original sense taken in contradistinction to the word "allodium." The word "allodium" signifies that which a man possesses in his own right without owing any service to any superior, and this certainly is property in the highest degree possible. As it is expressed, the owner of such a right has *absolutum et directum dominium*. But Blackstone tells us that *fædum*, or fee, is that which is held of some superior on condition of rendering him services, and that the ultimate property in the land resides in that superior, so that the tenant or vassal has merely the use of the land, the right to take the profits thereof. The tenant's estate is property; but it is not property in the absolute or allodial sense, but is qualified or feudal. It is his demesne as of fee; but it is not purely and simply his own, since it is held of a superior lord.<sup>2</sup>

<sup>1</sup> 1 Wash. R. P. 18, 19. The great lords owning in fee under the king, or as we would call them, the barons, were in turbulent periods in the Middle Ages frequently at war with each other, and Sullivan is of the opinion that the word "feud" has thus come in our language to signify a mortal quarrel. Sullivan's Law Lectures, 118.

<sup>2</sup> 2 Black. Com. 104-106. Professor Hammond is of the opinion that in some cases in the Middle Ages the rent reserved upon the creation of a fee was so exorbitant that the entire property might practically be con-

The ceremonies attending the conferring of a fief, feud, or fee were of a very elaborate sort. If the transaction was by knight service, which we shall presently explain, there was homage; and this was a ceremony in which the prospective grantee, or vassal, played a very abject part, while the prospective grantor, or lord, played a very grand part, for the vassal knelt at the feet of the lord and promised to serve him with life and limb and worldly honor. Then there was the ceremony of fealty, which was an oath of allegiance taken by the grantee, and even in such humble transactions as the creation of a mere term of years the grantee swore fealty, and of course he did when any higher feudal relation was established between the parties. Then there was the double ceremony of investiture, for investiture was of two sorts, proper and improper. In the king's courts there grew up a custom, when a fee was to be created by the king, of his putting a very handsome robe on the shoulders of the new grantee; and there was another ancient custom, that of delivering to the grantee a war glove, which he could put on his hand to signify that he would fight for the land as against all comers. When grants of land were made to the Church, the title would be very apt to remain in the grantee for a very long time, or, as it is expressed in the books, in perpetuity, so that there was a probability that the recollection of the transaction of the creation of the new fee might be lost, and it became common to use as a symbol in improper investiture a deed, and the other symbols went out of vogue. Now we shall presently see that it was the proper investiture which was the efficacious thing in conveying the land; but the improper investiture had a value, for if the lord refused to follow up the improper investiture by the proper investiture, the other party had a right to compel him to do so. But if the lord had in the meantime conveyed the lands to somebody else,

sidered as in the lord. Professor Hammond in the *Green Bag* for June, 1892, pp. 283, 285, 288, 289; *Tudor's Lead. Cas.* 292 (3d ed.).

there was the right to compel him to give other lands of equal value.<sup>1</sup>

We turn now to the proper investiture. This was the feoffment and livery of seisin. It was that which really transferred the land. The ceremony consisted of the lord and vassal going upon the land, and there the lord delivered something to the vassal as symbolic of the transfer to him of the land. This might be the picking up of a clod or a twig from the earth and the handing it over to the vassal in token of the delivery of the land to him, or it might be the handing over to him of a knife or a rod, and these would be accompanied by the appropriate words of giving and granting. Sometimes the charter of feoffment, the parchment document, would be laid upon the ground by the lord and picked up by the vassal. But it was not the charter of feoffment which was efficacious in transferring the title. It was the actual putting of the vassal into possession of the land, the making to him livery of seisin, which was the delivery of the possession, thereby doing as much as a man could do, although he could not physically deliver the property as he could a bale of goods.<sup>2</sup>

Now while, as we shall later see, land was conveyed by other forms of conveyance, even in very early times in England in some cases by force of a deed, yet this feoffment and livery of seisin may be regarded as the great fundamental common-law method of conveying land. And while charters of feoffment were in use, as above said, at an early day, yet it was not until so late a time, speaking relatively, as the twenty-ninth year of the reign of Charles II. that feoffments were required to be evidenced by a writing. This became necessary in that year by the Statute of Frauds.<sup>3</sup>

<sup>1</sup> 1 Hallam's Middle Ages, 170 (Boston ed. 1861); Sullivan's Law Lectures, 58-60; Dalrymple's Essays, 193; Co. Litt. 48 a; 2 Black. Com. 315, 316; Tied. R. P. §§ 24, 770; Williams on Seisin, 5, 99 *et seq.*; 1 Scribner on Dower (2d ed.), 250, 251; 2 Pollock & Maitland, 85, 86, 97.

<sup>2</sup> See the authorities in note 1, above.

<sup>3</sup> See the authorities in note 1, above.

We have spoken of livery of seisin, and we have been sketching the ceremony of actual livery of seisin, also called livery of seisin in deed. But there was also livery of seisin in law. We shall later see that there was actual seisin and seisin in law, but we must not confuse these with actual livery of seisin and livery of seisin in law. Now livery of seisin in law was when no actual entry was made upon the land in the transaction of the feoffment. The lord, whom we may describe conveniently as the feoffor, while the vassal was the feoffee, could point out the land, and this was sufficient, accompanied by the language of the gift, if the feoffee afterwards should enter upon the land. But he must enter during the lord's lifetime.<sup>1</sup>

Then, again, in turbulent periods in the Middle Ages—for the barons were often at war with each other—it was not always safe to perform the ceremony of feoffment upon the land. In such a case it was enough for the feoffee to go as near the land as he could without the risk of his life, and claim the land, and he ought to do this as often as once a year. This was called continual claim.<sup>2</sup>

In these cases of livery of seisin in law the transaction was personal, and had to be performed by the parties themselves. But actual livery of seisin could be given and received by attorney, but the attorney must be empowered by deed.<sup>3</sup>

Seisin was either the "actual seisin," sometimes called "seisin in deed," or else it was "seisin in law." Confining our attention to the actual seisin, it has been defined by Spence in his *Equitable Jurisdiction* and by Washburn in his *Real Property* as the right to hold.<sup>4</sup> But seisin originally meant possession. We have seen above that tenants for years have but a personal property interest, although they are in posses-

<sup>1</sup> See the authorities in note 1, page 6, above.

<sup>2</sup> See the authorities in note 1, page 6, above.

<sup>3</sup> See the authorities in note 1, page 6, above.

<sup>4</sup> 1 Spence Eq. Jur. 135; 1 Wash. R. P. 18, 19. See further, 12 Law Quart. Rev. 240.

sion of the land as visibly as any owner of real estate can be. These terms of years are called "chattels real," while ordinary personal property is called "chattels personal." It may be interesting to point out that most personal property in the Middle Ages consisted of cattle, and hence the word "chattel."

Now, if we go far enough back in history after the Conquest we shall find that it was the custom to speak of a man as seised of a chattel, because he had possession thereof, and tenants for years were spoken of as seised.<sup>1</sup> But this usage went out of date ages ago, and the word "seisin" is never applied except to the possession of a freehold estate in land. From the time that the word "seisin" ceased to be applied to personal property, actual seisin has been the possession of land by one claiming a freehold estate therein.

We have already referred to the services which the vassal was bound to perform. Now there were two great classes of tenure,—free tenure and villain tenure; and the English copyhold estate is derived from villain tenure, and some of the best lands of England to-day are held in copyhold.

Freehold tenure was chiefly of two sorts, — knight service or military tenure, and socage.

Military tenure involved the obligation on the part of the vassal to render military service to the lord, and this frequently became commuted for money, and this substitution of money for military service was called "scutage" or "escuage."

Socage was the payment of a rent or the obligation to perform rural labor upon the lord's demesne lands. Rural labor is a mark of villain tenure, and villain tenure involved a lack of precision in respect to the services,<sup>2</sup> while a free tenant

<sup>1</sup> 2 Pollock & Maitland, 29, 30–32, 36, 37, 68, 93, 105–117, 119, 121, 215, 329; 1 Law Quart. Rev. 324; 2 Law Quart. Rev. 481; 2 Black. Com. 32, 253, 254, 259, 293, 526–531 (Hammond's ed.); 3 Black. Com. 286 (Hammond's ed.); Challis R. P. (2d ed.) 55, note.

<sup>2</sup> 3 Hallam's Middle Ages, 164 *et seq.* (Boston ed. 1861); 1 Hallam's Middle Ages, 198, 200 (Boston ed. 1861).

knew with a good deal of precision what services he was bound to render. Now the rent might be in produce of the land or it might be a money rent, and in free tenure it was very unusual for the services to be those of labor.<sup>1</sup>

To have the lands held of you by knight service was the more honorable tenure, but socage was the more remunerative, and it was more honorable to hold by knight service than by socage.<sup>2</sup>

As a general rule the tenants who held immediately of the king held by knight service,<sup>3</sup> and in the grants by the crown to the early American colonies the charters provide that the lands granted by the crown shall be held in free and common socage and not *in capite* by knight service.<sup>4</sup>

Free and common socage is the tenure by which all freehold lands in England are held to-day. Knight service tenure was abolished by statute in the reign of Charles II., and all freehold lands came to be held by socage tenure.<sup>5</sup> The theory of the law remains to-day in England that the ultimate ownership of the land is in the king, and all landowners hold under him. While this had an immense practical value when the pretension was first set up at the time of the Conquest, it is to-day nothing but a legal theory, historically true.<sup>6</sup>

The Saxon population of England fell after the Conquest into a degraded condition to a very considerable extent, and this degraded condition constituted what is called villainage.

The villain was wholly dependent upon his lord's will. If

<sup>1</sup> Vinogradoff on Villainage in England, 196 *et seq.*, 308-312, 325, 334, 338, 346; 1 Pollock & Maitland, 272; 1 Sullivan's Law Lectures, 157 (American ed. 1805).

<sup>2</sup> 2 Hallam's Middle Ages, 330 (Boston ed. 1861).

<sup>3</sup> But anciently there were some cases of tenancies *in capite* by the tenure of socage. Vinogradoff on Villainage in England, 196; 1 Pollock & Maitland, 237.

<sup>4</sup> 1 Wash. R. P. 39 *et seq.*

<sup>5</sup> 1 Wash. R. P. 27; 2 Black. Com. 77, 104-106; Sullivan's Law Lectures, 72.

<sup>6</sup> 1 Wash. R. P. 27; 2 Black. Com. 104-106.

a villain purchased or inherited land, the lord might seize it. If he acquired personal property, the lord might take it from him. Even his person was subject to be taken by his master in case he fled from his service. His children were born into the status of villainage. It was, however, toward his master only that he was a villain.<sup>1</sup> But he had no right of action against his lord unless he made an agreement with him, in which case he could implead his lord.<sup>2</sup> In case a villain should sue, he must do so through the agency of his master.<sup>3</sup> A free-man could hold lands in villainage, and while his person was not subject to servitude, he was bound as owner of the land held in villainage to arbitrary services at the will of his lord.<sup>4</sup> The services under villainage came in time to be less onerous, and so early as the reign of Edward I., the tenants in villainage came in some manors to be bound only to stated services, as recorded in the lord's book. This change very likely at first occurred in respect to freemen holding tenancies in villainage, and later many tenants in villainage succeeded in getting copies of the court roll for their security. Thus was effected a transformation from tenancies in villainage into copyhold estates.<sup>5</sup> A villain was real property.<sup>6</sup> The great majority of the thirteenth century peasantry in England were villains.<sup>7</sup>

The expressions "villain regardant" and "villain in gross" have led some persons to suppose that villains were of two

<sup>1</sup> 3 Hallam's Middle Ages, 164 *et seq.* (Boston ed. 1861); 1 Hallam's Middle Ages, 198, 200 (Boston ed. 1861); Vinogradoff on Villainage in England, 68, 86-88, 149, 389, 390.

<sup>2</sup> Vinogradoff on Villainage in England, 70, 214.

<sup>3</sup> 1 Hallam's Middle Ages, 200 (Boston ed. 1861); Litt. § 189; 1 Stubbs' Const. Hist. of England, 426; 3 Stubbs' Const. Hist. of England, 604.

<sup>4</sup> 3 Hallam's Middle Ages, 164 *et seq.* (Boston ed. 1861); 1 Hallam's Middle Ages, 198, 200 (Boston ed. 1861); Vinogradoff on Villainage in England, 140.

<sup>5</sup> Vinogradoff on Villainage in England, 77, 80; 3 Hallam's Middle Ages, 164 *et seq.* (Boston ed. 1861); 1 Hallam's Middle Ages, 198, 200 (Boston ed. 1861).

<sup>6</sup> 1 Hallam's Middle Ages, 322 (Boston ed. 1861).

<sup>7</sup> Vinogradoff on Villainage in England, 43, 44, 387.



classes. But it is now understood that these terms were merely terms of pleading and proof; that when a villain was spoken of without reference to any particular manor to which he belonged he was styled a villain in gross, but that when he was spoken of with reference to some particular manor he was called a villain regardant.<sup>1</sup>

The relation between the lord and vassal was one of mutual helpfulness. The vassal owed the services. The lord, on the other hand, was bound to protect him in his title. Feudalism is poorly thought of by many in this age, for this is an age of contract and not of status. But it was wonderfully adapted to its time, for it was merciful in that the weak man was protected. But of course it is now outgrown.

Perhaps this statement that the feudal system was a relation of mutual helpfulness can be illustrated by a brief reference to the country in which it first attained a systematic development. We have above said that this country was France. Now after the death of Charlemagne the state fell into a chaotic condition, and the large landowners became engaged in civil war with each other. The result of this was that small landowners were exposed to the rapacity of the owners of castles and fastnesses, and were driven as a matter of security to seek the protection of their superiors, and this was accomplished by their recognizing the superior as lord. In some cases the inferior granted his lands to the superior, of which the superior immediately made a regrant upon condition that the inferior should render him military service (knight service) and recognize him as lord. In other cases the transaction of grant and regrant would not be performed, but the same result was accomplished by a recognition on the part of the inferior of his obligation to perform military service, and thus to confess an original grant to him, which had never existed, in return for the protection which the great man would afford him.

<sup>1</sup> Vinogradoff on Villainage in England, 48-58.

Now there was a custom in France and Germany older than this feudal compact, known as "commendation." The inferior landowner would commend himself to the protection of a superior landowner, sometimes for a money consideration, sometimes by way of fidelity in return for protection; and it is supposed that the feudal relation when it arose in the way above mentioned was really an extension of the practice of commendation, although commendation involved only a personal relation and did not contain any element of lordship in respect to the lands of the inferior.<sup>1</sup>

<sup>1</sup> 1 Hallam's *Middle Ages*, 164-166, 307-309 (Boston ed. 1861).

## CHAPTER II.

## THE STATUTE OF QUIA EMPTORES.

THE expressions “tenant *in capite*” or “tenant in chief” in their broad sense mean an immediate tenant of a person. But the best writers on constitutional history and law customarily use these expressions as meaning an immediate tenant of the king, without necessarily indicating this by the words “of the king.”<sup>1</sup>

The king, as before said, from the time of the Conquest was the ultimate owner of all the land in England, and he parcelled the land out among his favorites, they holding of him in fee. The relation between the king and these grantees and persons holding of them, was not a political relation, but was a feudal relation. The king, in other words, was chief lord, and they were his vassals.

Blackstone tells us that the notion that all the lands are held, or holden, came to be so familiar that when one should think of a fee he would think of it not in its primary signification as that which is held, or holden, but in its secondary meaning, which is that it is an estate of inheritance which the heirs general may inherit;<sup>2</sup> and the formula of a fee, that is a fee simple, is a limitation to A and his heirs.

<sup>1</sup> The best authorities use the term “tenant *in capite*” without necessarily saying of the king, as meaning an immediate tenant of the king and not of anybody else. 3 Hallam’s Middle Ages, 18, 19, 198–208 (Boston ed. 1861); Taswell-Langmead’s Const. Hist. of England (3d ed.), 60, 143, note 1; Domesday Book and Beyond, 317. And so the best authorities use the term “tenant in chief” without necessarily saying of the king, as meaning an immediate tenant of the king and not of anybody else. 2 Pollock & Maitland, 404; 3 Hallam’s Middle Ages, 18, 19 (Boston ed. 1861); Taswell-Langmead’s Const. Hist. of England (3d ed.), 64, 60.

<sup>2</sup> 2 Black. Com. 105, 106.

In early days after the Conquest the owner of a fee simple could not convey a fee without the consent of his heir; so that the ancestor being in possession of the land, and the heir entitled to that possession on the death of the ancestor, the heir was regarded as taking not by descent but by purchase. But this was changed by the courts, not by legislation, in the reign of Henry III., during which reign it became the law that the ancestor could alienate without the consent of the heir; so that from that time, and ever since, the heir takes by descent.<sup>1</sup>

The books are so obscure in respect to the power of tenants *in capite* to make an alienation of their lands without the consent of the king, that we shall confine our attention to the subject of alienation by mesne tenants, that is, tenants who held by subinfeudation either mediately or immediately under tenants *in capite*.

Under the strict feudal system which obtained on the continent of Europe, there could be no alienation, either by the lord or his vassal, without the consent of the other. We shall see that the rule was not so strict in England, following Pollock and Maitland's theory, although there is a theory of some writers that the English law was anciently very strict.<sup>2</sup>

We have just spoken of subinfeudation, but at a very early day there were also outright alienations, that is, substitutions. Suppose that X is owner of land in fee simple; he conveys to A and his heirs to hold of him. A conveys to B and his heirs to hold of A. This is subinfeudation. But suppose that X conveys to A and his heirs, not to hold of him at all. A in this case comes to hold immediately of the lord of X by the same services by which X himself held, so that X is no longer in the line of tenure. This is a substitution of A for X.

<sup>1</sup> 2 Black. Com. 301; Williams, R. P. (17th ed.) 64, 65, 86.

<sup>2</sup> 1 Pollock & Maitland, 310, 313, 320, 324, 325, 326; 2 Pollock & Maitland, 324; 2 Law Quart. Rev. 299.

Confining our attention then to alienations by mesne tenants, it is probable that at the date of the Charter of 1217, in the reign of Henry III., a tenant could make a subinfeudation of his entire fee of either a part of the land or of the whole of the land without the consent of the lord, and could make a substitution by conveyance of the whole of the land without the consent of the lord, although, perhaps, not of a part.<sup>1</sup>

By the expression "entire fee" is meant an estate having the quantity of a fee, which, as just shown, is an estate of inheritance. For instance, if there be a feoffment to A, since the word of inheritance (heirs) is not present, A has an estate only for life.

The Charter of 1217 provides that the tenant may make an alienation without the consent of the lord, provided that enough of the land be retained to answer for the feudal services due the lord; and this was practically understood to be one-half of the land. This charter probably regulated the matter for something over seventy years, until in the eighteenth year of Edward I. the celebrated statute of *Quia Emptores* was passed, and this was in the year 1290.<sup>2</sup>

The statute of *Quia Emptores* is one of some three or four of the greatest statutes, historically speaking, ever enacted in England, and in the case of First Universalist Society of North Adams v. Boland, 155 Mass. 171, the court was

<sup>1</sup> 1 Report of the Lords' Com. on the Dignity of a Peer, 398 (A. D. 1819); Stubbs' Select Charters (2d ed.), 346 (cl. 39), 354; 1 Hallam's Middle Ages, 174, 175 (Boston ed. 1861); 2 Black. Com. 287-289; Tudor's Lead. Cas. (3d ed.) 772, 774; Sullivan's Law Lectures, 119, 148-150; Coke's 2d Inst. 505; 1 Spence's Eq. Jur. 137, 138; Burgess v. Wheate, 1 Wm. Blackstone's Rep. 133-135, 147, 175; s. c. 1 Eden, 177; 1 Wash. R. P. 30, 31, 255, 256; Brookman v. Smith, 6 Exch. 306; s. c. 7 Exch. 271; Dalrymple's Essay on Feudal Property, ch. 3; Hargrave's and Butler's Notes to Coke on Littleton, note 272 to 309 a; Co. Litt. 309 b; 1 Gray's Cas. on Prop. 441, 442; Gray on Perp. § 20; Tied. R. P. § 22; Williams, R. P. \*323, \*324; Rawle on Cov. (5th ed.) §§ 4, 6; Taswell-Langmead's Const. Hist. of Eng. 64, 143 and note 1 (3d ed.); 8 Law Quart. Rev. 86.

<sup>2</sup> See the authorities in note 1, above.

called upon to decide regarding its operation to-day in Massachusetts.

It seems that at the date of this statute there were some doubts as to the power of the tenant to make a substitution without the consent of the lord, and one of the purposes for the enactment of the statute was to settle these doubts, and another was to destroy the right for the future to make subinfeudations of the entire fee. Therefore, from the time of *Quia Emptores* there never has been a fee simple created by subinfeudation, and every conveyance of an entire fee is a substitution.<sup>1</sup>

The statute of *Quia Emptores* was a compromise between the great lords and their vassals or tenants. The great lords were very anxious to get rid of subinfeudations of the entire fee, and the vassals were anxious to get a clear power of alienation of their land, dividing it up into as many small parcels as they might choose.<sup>2</sup>

The reason why the great lords wanted to get rid of these subinfeudations was because through them they frequently lost their escheats and other profitable incidents attached to their seignories.<sup>3</sup>

An escheat is based upon the want of a tenant to perform the services.<sup>4</sup>

<sup>1</sup> See the authorities in note 1, page 15, above.

<sup>2</sup> 1 Pollock & Maitland, 318 and note; 12 Law Quart. Rev. 299.

<sup>3</sup> See the authorities in note 1, page 15, above.

<sup>4</sup> Tudor's Lead. Cas. (3d ed.) 772, 774; *Burgess v. Wheate*, 1 Wm. Blackstone's Rep. 141; s. c. 1 Eden, 177; 3 Shars. & Budd, 489; 4 Law Quart. Rev. 330 *et seq.*; *In re Linton's Estate*, 48 Atl. Rep. 298 (Penn.). See *In re Bond* (1901), 1 Ch. 15; 14 Harv. Law Rev. 549. In the case of a grant of land to a corporation, the property escheated upon the dissolution of the corporation; and it is an open question whether it escheated to the grantor or to the grantor's lord. The argument offered to support the proposition that it escheated to the grantor's lord is based upon the effect of the statute of *Quia Emptores*, which would render a substitution of the corporation for the grantor necessary. Gray on Perp. §§ 44-51; 4 Gray's Cas. on Prop. 2, note. But at the common law the personalty of a corporation upon the dissolution thereof went to the king, and in

Suppose then that X makes a subinfeudation to A and his heirs, and A makes a subinfeudation to B and his heirs; suppose the conveyance by X was without warranty and that A dies without an heir, X would become entitled to the possession of the land, because the grant was to A and his heirs, and A has died without an heir. Now A might die without an heir, either because nobody might appear claiming to be his heir, or because, what appears to have been more common, A might be a bastard, and a bastard has no heirs at common law, unless he die leaving issue.<sup>1</sup> It therefore would be more difficult for X to secure his escheat if there were a string of subinfeudations, as the tenant in possession of the land might be removed many links in the chain of title from X at the time when X should become entitled to his escheat. The lords then wanted to get rid of subinfeudations of the fee. Now, then, if the tenants could make subinfeudations of the entire fee freely, the land might pass into remote hands, and, furthermore, might be divided up among numerous tenants, so that the chance of the lords being able to collect the services due them, and to avail themselves of the various profits of their seignories, was oftentimes very small.

For illustration, suppose that X conveys to A and his heirs to hold of X, and A conveys to B and his heirs to hold of A, and B conveys a part of the land to C and his heirs,

this country to the state. Gray on Perp. § 44, note 3. But in America equity affords relief, and protects both creditors and stockholders in their claims to the property of the corporation; and legislation has effected protection. *Folger v. Col. Ins. Co.*, 99 Mass. 276, 277; *Thornton v. Marginal Co.*, 123 Mass. 34, 35; *Foster v. Essex Bank*, 16 Mass. 245, 274; authorities in Gray on Perp. § 44, note 3; 2 Kent's Com. 307, 308 and notes; article by Ch. J. Doe in Harv. Law Rev. for Nov. 1892, pp. 172 *et seq.* and *passim*. Held, in *Titcomb v. Kennebunk Mut. Fire Ins. Co.*, 79 Me. 315, that when a mutual insurance company, being a corporation, is dissolved, its personalty, after all the liabilities against the corporation are discharged, vests in the state. It is a mutual company and has no stockholders.

<sup>1</sup> See 2 Black. Com. 193-196, 205, 206, 529 note 61 (Hammond's ed.); *In re Wood* (1896), 2 Ch. 596.

another part to D and his heirs, and another part to E and his heirs. Each conveyance, being to the man and his heirs, is a conveyance of the fee. That is the quantity of the estate of the grantee, and is often spoken of as the entire fee, to indicate that it is of larger quantity than a less estate, as, for instance, an estate for life. In such cases as the above illustration, as is easily seen, the lords were at a great disadvantage.<sup>1</sup>

While the statute of *Quia Emptores* favored the lords in the abolition of subinfeudations of the fee, it favored the tenants in respect to substitutions, for not only were substitutions of the fee permitted without any consent of the lord, but the statute even provided for an apportionment of the services, in case a part only of the land should be conveyed. And thus land could be divided up into any number of parcels among different grantees, and the whole land not be chargeable with the services due the lord, but only each fractional part for its particular share. The result was that the lords were in this respect greatly prejudiced, and at great disadvantage in reaping the benefit of the services in consideration of which they had given away their land.<sup>2</sup>

The complaint above mentioned of the lords, that by subinfeudation of the fee they lost their feudal privileges, and the hardship upon the tenants of having a fractional part of a tract of land charged with the services due from the whole tract, tell the story which has been told all through the ages. That story is the struggle of classes, the struggle between those who have more and those who have less. The lords found it hard to get back the land, to the possession of which they were legally entitled and with which they had parted without any other consideration than the rendering of services, and this because the tenants in actual possession of the land had come to feel that the land belonged to them, — a feeling very natural to one who is born upon the spot. The

<sup>1</sup> See Williams, R. P. 66, 68 (17th ed.).

<sup>2</sup> 1 Pollock & Maitland, 318 and note; 12 Law Quart. Rev. 299.



feeling which the people of New Hampshire had in the seventeenth and eighteenth centuries in resisting the payment of rents to the heirs of John Mason, illustrates to some extent this sentiment. John Mason had derived from the crown of England grants of New Hampshire lands, and his heirs claimed to own these lands as feudal lords; but the people who had settled upon these lands felt that they had an allodial title, and ignored the claims of the feudal lord to collect rents of them. Perhaps the analogy is not very close, as other elements entered into the controversy, but it must be remembered that these tenants were of English stock and were inspired by the sentiment which appears to be native to the English race.<sup>1</sup>

The only person in the realm who was entirely benefited by the statute of *Quia Emptores* was the king. His prerogative had been increasing at that period, and the statute did not apply to him, as to his tenants *in capite*, so that his tenants *in capite* were hampered in the matter of procuring his consent to an alienation by them.<sup>2</sup> But in a couple of reigns afterwards, in the reign of Edward III., this was remedied by a statute which permitted tenants *in capite* to alienate without the consent of the king, upon the payment of a small fine into the court of chancery.<sup>3</sup>

Now, subinfeudations were not entirely defeated by the statute of *Quia Emptores* but only subinfeudations of the fee. Therefore, after the statute, as well as before, if a man created an estate less in quantity than the fee, the grantee had of necessity to hold of him.<sup>4</sup> Suppose, for instance, that a man owns land in fee simple. He makes a feoffment to A for life. A must hold of the feoffor, and the interest which the feoffor retains is called his reversion; while if it were a

<sup>1</sup> 1 Belknap's Hist. of New Hampshire, 4-8, 25-28, 182 *et seq.*, 188-191, 321-328.

<sup>2</sup> 1 Pollock & Maitland, 318 and note; 12 Law Quart. Rev. 299.

<sup>3</sup> See the authorities in note 1, page 15, above.

<sup>4</sup> See the authorities in note 1, page 15, above.

subinfeudation of the fee, the interest of the feoffor would be called a "seignory."

Turning now to the alienation of the seignory, when a man created a fee to be held of him, this fee was of course carved out of his property in the land, and the property right he retained as lord, was called a "seignory." It was necessary that the owner of the fee should attorn to the grantee of the seignory and recognize him as the new lord. This ceremony of attornment was attended with great publicity, and was as conspicuous and elaborate as the ceremony of feoffment itself.<sup>1</sup>

The statute of *Quia Emptores* made no provision for the alienation of the seignory, but as the vassals or tenants had got rid of any possible necessity for the consent of the lord in case they conveyed the land, the courts of law, by a judgment, made the tenants accept the alienee of the seignory as the new lord, and bound them as effectually as if they had voluntarily made an attornment. These common-law processes are known as the writs of *Quis juris clamat*, or *Quid juris clamat*, and *Per quae servitia*.<sup>2</sup> It was not until the reign of Queen Anne, early in the eighteenth century, that a statute (4 Anne, ch. 16, § 9) was passed which abolished the necessity for an attornment, not only upon the alienation of a seignory, but upon the alienation of a reversion; and this statute has been declared to be in force in Massachusetts.<sup>3</sup>

<sup>1</sup> Watkins on Descents, 110; 2 Black. Com. 317.

<sup>2</sup> See the authorities in note 1, page 15, above; also 2 Pollock & Maitland, 102 and note 4; 1 Pollock & Maitland, 330; Sullivan's Law Lectures, 119.

<sup>3</sup> 2 Wash. R. P. 389 and note.

## CHAPTER III.

## THE CORPOREAL AND INCORPOREAL HEREDITAMENT.

THE books tell us pretty much everywhere that the corporeal hereditament has, at the common law, to be created by livery of seisin. We shall conform to this language for its convenience. But it is not strictly accurate; for there were, for instance, the conveyances by fine and common recovery, which did not, strictly speaking, contain the element of livery of seisin. The fine was regarded technically as a feoffment of record, and the common recovery as in the nature of a feoffment of record.<sup>1</sup> Fines and common recoveries were fictitious actions brought in the courts of law, and they operated as conveyances of land.<sup>2</sup> And we shall soon speak of the lease and release, which was an ancient kind of conveyance of the corporeal hereditament, and that did not contain the element of livery of seisin. But the feoffment which did contain that element is taken as typical, so that the common expression in the books is that a corporeal hereditament must, at common law, be created by livery of seisin.<sup>3</sup> But the books add that

<sup>1</sup> Note to the Duchess of Kingston's Case, 2 Smith's Lead. Cas. (8th ed.) 835, 836; Co. Litt. 9 b, 10 a, 49 a. See 2 Black. Com. 349.

<sup>2</sup> Fines were divided, amongst other classifications, into executed and executory. In the case of a fine executed the possession was immediately transferred from the cognizor to the cognizee, who might therefore enter on the land. In the case of a fine executory it was necessary for the cognizee to sue out a writ by which to acquire the possession of the land, unless he was already in possession. 1 Cruise on Fines and Recoveries, 62-65.

<sup>3</sup> See for instance 2 Black. Com. 104, 107, 108, 144, 166, 310-312; Gray on Perp. § 16 and note.

incorporeal hereditaments cannot from their nature be created by livery of seisin.<sup>1</sup>

Although incorporeal hereditaments were not invariably created by deed, yet the common method of creating them was by a deed of grant, and at common law the grant was not used for any other purpose.<sup>2</sup> Later in the book we shall discover that the deed of grant was not the only method used in the creation of an incorporeal hereditament at common law. It must be borne in mind by the reader that in this chapter we are confining our attention to the common law.

The common expression in the books is that corporeal hereditaments lie in livery, incorporeal hereditaments lie in grant.<sup>3</sup>

Now while the corporeal hereditament could never at common law be created to begin *in futuro*, the incorporeal hereditament may be created to begin *in futuro* ;<sup>4</sup> and the incorporeal hereditament is never created or transferred by livery of seisin, with the exception of when it is appendant or appurtenant to a corporeal hereditament.<sup>5</sup>

Suppose that the owner of a piece of land conveys it in fee simple, and does this by livery of seisin. Suppose that there is appurtenant to that land a right of way over the land of his neighbor. This right of way is called an easement. The incorporeal hereditament which is appurtenant to the corporeal hereditament, which is transferred by livery of seisin, will pass with the land conveyed. This is not strictly the creation of an incorporeal hereditament, but it is the transfer of an incorporeal hereditament by livery of seisin, because it is appurtenant to the corporeal hereditament which is conveyed.

<sup>1</sup> Gray on Perp. § 16 and note; Williams, R. P. \*239.

<sup>2</sup> Bigelow on Estoppel (3d ed.), 359.

<sup>3</sup> Williams, R. P. \*239.

<sup>4</sup> 2 Black. Com. 166; Gray on Perp. § 16 and note.

<sup>5</sup> There cannot, strictly speaking, be an actual seisin of an incorporeal hereditament unless it be appendant or appurtenant to a corporeal hereditament. Williams on Seisin, 53, 58.

But it is only in strictness that we cannot speak of the actual seisin of an incorporeal hereditament, unless it be appendant or appurtenant. Take the subject of rents. Let X own land in fee simple and convey it to A and his heirs, reserving a rent to issue out of the land in favor of himself (X) and his heirs; this rent is an incorporeal hereditament, and after some of it has been received, X and his heirs are regarded as actually seised of the rent; and this is not a fanciful point but is a substantial one, as will appear from a perusal of the note at the end of this chapter.

And this is a convenient place to distinguish between the corporeal and the incorporeal hereditament alluded to in Chapter I.

We do not agree that the corporeal hereditament is the actual land which you can touch, while the incorporeal hereditament is an intangible right in land, for the ownership of any property is an ownership of a right. All that one can own is a right of some sort in some thing.<sup>1</sup> Doubtless in old times when a man made a feoffment he had a feeling that he was conveying the very substance of the earth itself. But really all that he was conveying was a certain kind of a right in the earth. He would sometimes, as before shown, pick up a clod or a twig from the ground and hand it over because he could not pick up the earth itself and hand it over. It is true that he passed the possession of the land, whereas in the case of the two incorporeal rights above mentioned he did not pass the possession of the land. But the right to possession of the land is only a certain kind of a right in the land, while the right of way and the rent belong to a different class of rights in the land. They are all of them rights in land.

Two reasons may be given for the proposition that the corporeal hereditament cannot be created to begin *in futuro* :

<sup>1</sup> See Prof. Maitland in 2 Law Quart. Rev. 488, and Mr. Pike in 5 Law Quart. Rev. 42, 43.

First, because under the feudal system under which it originated, upon the creation of the corporeal hereditament, there must always be somebody to perform the services at the time of the feoffment;<sup>1</sup> secondly, because, says Blackstone, a feoffment was required in the creation of a corporeal hereditament so as to constitute a notorious and public act, that persons claiming a better title might know against whom to bring their actions to recover the land, and a feoffment had to operate now, presently, and not *in futuro*.<sup>2</sup>

For illustration, X, the owner of land, makes a feoffment to A and his heirs, to begin in A in one year. This is bad. Another illustration: In *Savill v. Bethell*,<sup>3</sup> decided by the Court of Appeal in Chancery in 1902, the court cites as good law *Bullock v. Burdett* (Dyer, 281 a; Moore, 81; Viner's Abr., tit. Election A, pl. 1), which is as follows: If there be a feoffment by one owning a piece of land, of an indeterminate portion thereof, thus of eighteen acres out of a total of one hundred acres, to hold at the election of the feoffee when he shall please, this feoffment is void as being an undertaking to create a freehold to begin *in futuro*.

Now an incorporeal hereditament was not tenurial. It was not an element in tenure. It is true that there is at common law rent service which is a feudal element. But no services are ever due from the owner of an incorporeal hereditament. And as it is not created by livery of seisin, and as no services are due, there is no obstacle to its being created to begin *in futuro*. It is created by deed of grant and may begin *in futuro*. We shall soon see that a mere term of years, which is not a corporeal or an incorporeal hereditament according to the common understanding, may be created to begin *in futuro*. But although the incorporeal hereditament may be created to

<sup>1</sup> 3 Co. Litt., notes by Thomas, etc., \*103, note (g); 1 Leake's Land Law, 47, 48.

<sup>2</sup> 2 Black. Com. 107, 108, 144, 166, 310-312; 1 Wash. R. P. 32; Co. Litt. 9 a; 3 Co. Litt., notes by Thomas, etc., \*103, note (g).

<sup>3</sup> *Savill v. Bethell* (1902), 2 Ch. 538.

begin *in futuro*, when once existent, if it be of a freehold quantity, it cannot be assigned to take effect *in futuro*.

Suppose, then, that a man owning the land in fee simple does by a deed of grant create a rent to issue out of his land, which rent has a freehold quantity. Thus he grants the rent to A and his heirs. This is an incorporeal hereditament, as much so as those above mentioned. It is plain that in neither case is there anything tenurial, and that there are no services involved. Now there is no objection to his creating that right to begin at some future day. But since the rent has the quantity of a freehold, being limited to A and his heirs, the principle that an existing freehold cannot be made to take effect *in futuro* is applied as strictly as if it were the corporeal hereditament itself which was being conveyed. Therefore A, the owner of the rent, though he may grant it by deed of grant to B and his heirs, cannot grant it to him to begin at some future day.<sup>1</sup> Incorporeal hereditaments, then, may be created to begin *in futuro*. But, when once existing, they cannot be assigned or conveyed to take effect *in futuro*.

Before closing this chapter, and in order to elucidate it, we will give some account of the subject of rents at the common law.

Rent service is a service reserved by way of rent to the grantor, who grants an interest in his land; and upon failure by the grantee to perform that service there is a right to distrain. The rent service may be, says Gilbert, either in labor, money, or provisions.<sup>2</sup> But Vinogradoff, a very recent and eminent authority, does not regard labor as rent. Labor was a distinctive element in villain tenure, although it came,

<sup>1</sup> Gilbert on Rents, 59-61, cited in Gray on Perp. § 17, note; 1 Preston on Estates, 217 and note; Doctor and Student, Dial. 2, ch. 20; Tudor's Lead. Cas. (3d ed.) 297; Lord Stafford's Case, 8 Rep. 74 b; Brook's Abr., tit. "Grant," 60; Sugden's Gilbert on Uses, 86, note (4); Osmere v. Sheafe, Carthew, 308; Tyler v. Fisher, Palmer's Rep. 29, 30; Eccl. Commrs. v. Treemer (1893), 1 Ch. 171.

<sup>2</sup> Gilbert on Rents, 9.

in course of time, to be commuted for money.<sup>1</sup> Rent service may be reserved upon the creation of a term of years, upon the creation of a life estate, also upon the creation of an estate tail. Before the statute of *Quia Emptores*, rent service could be reserved upon the creation of a fee simple; and it could be reserved by deed or without deed.<sup>2</sup>

Rent charge and rent seck differ from rent service in these respects: that if at any time since the statute of *Quia Emptores* an owner of a fee simple estate in land grants it to another in fee simple and reserves a rent, this is a rent charge or a rent seck, according to whether a right to distrain for the rent is stipulated for or not in the deed. If there be a provision to that effect, then the rent is a rent charge; otherwise, it is a rent seck, or (*siccus*) dry rent. And so, if the owner of a fee simple estate in land grants to X and his heirs a rent to issue out of the land forever, this is a rent charge or a rent seck, according to whether there be a right of distress or not; and the rent granted may be of a less quantity than a fee simple.

A rent service is apportionable, but this is not true of a rent charge at common law, as a rule; for there were exceptions in the matter of rent charge.<sup>3</sup> The reason for allowing an apportionment in the case of rent service is that a purchase by the owner of the rent of a part of the land ought not to vitiate the entire rent, as the tenant is bound by his oath of fealty to perform the services; but it would be unreasonable to require the tenant to perform the whole services in such a case; so that the rent would be apportionable according to the proportion in value of the land which the tenant should continue in the possession of. There was no such feudal reason in the case of rent charge, which was not a tenurial rent.<sup>4</sup>

<sup>1</sup> Vinogradoff on Villainage in England, 167 *et seq.*, 178, 181, 187, 188, 215, 216, 301, 307-310, 341, 342.

<sup>2</sup> Litt. § 216.

<sup>3</sup> Copinger & Munro's Law of Rents, 553, 599; Gilbert on Rents, 151 *et seq.*

<sup>4</sup> Gilbert on Rents, 152.



Now as to the matter of seisin. It was very important that seisin be given of the rent. The books speak of an actual seisin of a rent. Thus, it is said that if a rent charge be created by means of a conveyance to uses, the grantee has an "actual seisin."<sup>1</sup> But the expression "actual seisin" of a rent is not common. Thus Washburn says that the seisin of a rent is a seisin in law, as there can be none in fact;<sup>2</sup> Blackstone says that the receipt of rent is the "equivalent to corporal seisin."<sup>3</sup>

Coming now to the matter of a deed in the conveyance of a fee simple in the land with a reservation of rent, before the statute of *Quia Emptores* rent service could be reserved upon the creation of a fee simple; but after *Quia Emptores* (not referring to grants by the Crown) that was not the case. The statute of *Quia Emptores* prevented the making of a subinfeudation of the fee simple. It permitted a conveyance by substitution, but not a conveyance by subinfeudation of the fee simple. How then could an owner of a fee simple convey thereafter in fee simple and reserve a rent? The answer is that he could accomplish this by a deed; and the rent is a rent charge or a rent seek according as there is a clause of distress or not. It is not rent service. It is not tenurial.<sup>4</sup>

So, also, a condition is valid; so that if there be a conveyance, even of the fee simple, with a reservation of rent by deed and with a condition subsequent of forfeiture of the estate granted upon non-payment of the rent, this condition is valid, and is not affected by *Quia Emptores*.<sup>5</sup> Thus while the relation of tenure cannot exist as between the grantor

<sup>1</sup> Tudor's Lead. Cas. (3d ed.) 343.

<sup>2</sup> 2 Wash. R. P. 8.

<sup>3</sup> 2 Black. Com. 209. See further Williams on Seisin, 58; 1 Scribner on Dower (2d ed.), 267.

<sup>4</sup> Litt. §§ 213-217.

<sup>5</sup> Gray on Perp. § 303; Williams, R. P. (17th ed.) 399, 400; Copinger & Munro's Law of Rents, 8.

who conveys after *Quia Emptores* and his grantee of a fee simple, so that the grantee cannot "hold" in socage of the grantor owing him services by way of rent, yet the grantor may reserve a rent, as above explained.

### NOTE.

There cannot, strictly speaking, be an actual seisin of an incorporeal hereditament unless it be appendant or appurtenant to a corporeal hereditament;<sup>1</sup> but the books contain the expression of an actual seisin of certain incorporeal hereditaments, amongst which rents figure prominently. The rents here referred to are rent service, rents charge, and rents seck.

There are some peculiarities in respect to rents. Thus, the widow of a tenant in tail of a rent charge cannot have dower in the rent if her husband has died without issue. This is very different from the case of the right of the widow when the estate tail is an estate in land. This rule as to dower in the rent is an honorable exception from an excellent principle. It would not be right that she should have dower, as the grantee of a rent charge is subject to no feudal burdens, and the burden of the rent is imposed upon the tenant of the land; and thus it would be unjust that the burden of the rent should endure beyond the period expressly provided for.<sup>2</sup> It is otherwise if there be a limitation over of the rent in fee simple, for here the rent continues.<sup>3</sup> Moreover, a tenant in tail of a rent charge *de novo*, without any remainder over of the fee simple in the rent, cannot create a valid fee simple absolute by suffering a common recovery.<sup>4</sup>

Conversely to the above proposition as to dower, if an estate tail in land be created with a reservation of rent to the donor and his heirs, and the donee die without issue, the widow of the donor has no dower in the rent; nor has the husband of the donor curtesy in the rent.<sup>5</sup>

<sup>1</sup> Williams on Seisin, pp. 53, 58.

<sup>2</sup> Co. Litt., Butler's note, 298 a; 2 Gray's Cas. on Prop. 707, note. See further, Co. Litt., Butler's note, 241 a.

<sup>3</sup> Copinger & Munro's Law of Rents, 33, 34.

<sup>4</sup> Co. Litt., Butler's note, 298 a; Copinger & Munro's Law of Rents, 29.

<sup>5</sup> Park on Dower, 162, 163; Co. Litt., Butler's note, 241 a; Co. Litt. 30 a; 3 Preston on Abstracts of Title, 384.

Now, as to the matter of seisin. It was very important that seisin be given of the rent. It is true that there could be dower in a rent even though nothing equivalent to actual seisin of a corporeal hereditament had been acquired of it; but then there could be dower in land when the husband of the dowress died without having more than a seisin in law. The case of curtesy, however, is peculiar; because, at common law, an actual seisin of the land by the wife is required, to entitle the husband to curtesy, whereas the husband could have curtesy in a rent even though the wife should die before any rent had become due, and, therefore, before there was the above equivalent to actual seisin of the rent. The reason of this is that the husband could not by any effort whatever attain to any other seisin.

Now, how was the seisin of a rent, which was to issue out of the land in favor of the grantee, procured at common law? In addition to the execution and delivery of the deed in the creation of a rent charge or rent seck, there must be given a "seisin in deed" of the rent to entitle the grantee to maintain an action for the rent charge and any remedy whatever for a rent seck; for there was a power to distrain in the case of a rent charge arising from the force of the conveyance by deed. This "seisin in deed" is conferred by the ceremony of the grantor's handing the grantee a penny, or anything valuable, in the name of seisin of the rent. If the grantee of the rent charge should assign his interest, the grantor of the rent, the terre-tenant, must attorn to the assignee, which may be by mere words, without any act. And this attornment will confer upon the assignee a right to distrain in case of the rent charge; but to confer a right of action upon the assignee, the terre-tenant must pay something to the assignee in the name of seisin of the rent.<sup>1</sup>

The matter of the descent of a rent in fee simple involves this matter of seisin. The rent at common law descended to the heir of the person last constructively seised, and the receipt of rent would be a sufficient constructive seisin to constitute the owner the stock from whom to trace the descent.<sup>2</sup> At common law a fee simple in possession in land descended to the heir of the person who was last actually seised. To acquire this actual seisin it was necessary that the heir, after the death of the ancestor, should make an entry upon the land. Entry by the lord or guar-

<sup>1</sup> 2 Pollock & Maitland, 128, 131.

<sup>2</sup> Tudor's Lead. Cas. (3d ed.) 730; Williams on Seisin, 58.

dian might be made when the heir was under age; and the possession of a tenant for years avoided the necessity for an entry in any case. There were a few other cases where an entry could be dispensed with. Now the rule as to the manner of descent of the corporeal hereditament was applied to the matter of the descent of a rent in fee simple, and here the required seisin was obtained by receipt of rent. This was regarded as the equivalent of an entry upon land for the above-mentioned purpose.

The statute of *Quia Emptores* is not in force in Pennsylvania, so that in that state a ground rent, which is a rent reserved by the grantor to himself and his heirs of lands in fee simple, is a rent service and not a rent charge.<sup>1</sup>

As to rents in various parts of the United States and in some foreign countries, see Cadwalader on Ground Rents, § 151, note.

A distinction has been taken by some eminent writers to the effect that while a grantor of a fee simple in land may, even since *Quia Emptores*, impose a condition subsequent, upon breach of which he may enter and defeat the estate, yet that *Quia Emptores* forbids him to impose a valid special or collateral limitation upon a conveyance of land to A and his heirs. Thus: To A and his heirs, tenants of the Manor of Dale. The argument is that A takes a fee simple absolute and not a fee so long as he and his heirs after him shall be tenants of the Manor of Dale. Different views are entertained by eminent writers upon this subject.

The Supreme Court of Massachusetts has recently passed upon this point in *First Universalist Society of North Adams v. Boland*, 155 Mass. 171, and holds that while the limitation over in that case is void for remoteness, there is a perfectly valid possibility of reverter in the grantor, and thus that a determinable fee may be limited since the statute of *Quia Emptores* as well as before; and that not being upon condition subsequent, but being an estate to continue so long as the real estate shall be devoted to certain specified uses, no entry would be necessary; but that the estate would cease and determine upon its own limitation in the event of its ceasing to be devoted to the specified uses. The deed was to have and to hold "so long as" the property shall be "devoted to the uses, interests, and support" of certain specified doctrines of the Christian religion, and when it shall be diverted from such uses, etc., the title of the grantee shall cease "and be forever vested" in certain other persons.

<sup>1</sup> Cadwalader on Ground Rents, §§ 125, 126, 131-135.

Extracts from an article by the author in 1 Boston Law School Magazine, No. 4, page 18.

Held, in *Hartley v. Maddocks* (1899), 2 Ch. 199, following *Co. Litt.* 148 b, that if there be a reservation of a rent and the title to a part of the land fails, the rent shall be apportioned; but if there be a grant of a rent out of the land and the title to a part of the land fails, the remaining part must bear the whole rent.

## CHAPTER IV.

## THE FEE SIMPLE AND SOME OTHER FEES.

WE have already alluded to the secondary meaning of the fee simple as being an estate of inheritance which the heirs general may inherit. The fee simple is an estate, and the word "heirs" is essential as limiting the quantity of the estate. Under the Roman law the heirs would inherit if the gift were simply to A;<sup>1</sup> but under the common law of England the word "heirs" was required to mark the bounds of what was granted, so that if the grant were simply to A he would have but a life estate, and his heirs would have no right in what was granted to him. We have already seen that in the early English law the heirs of A, in the case of a grant to A and his heirs, had such an interest given them that A could not make an alienation of the land without the consent of the heir. As before stated, the formula of a fee simple is a limitation to A and his heirs.

In a limitation to A and his heirs, the word "heirs" marks the bounds of the estate or status of A. The estate or status of A is that of a freeholder; that is, of a man holding in freehold tenure, a freeman.<sup>2</sup>

The absence of the word "heirs" shows that the estate is of a less quantity than a fee, being of no longer duration than for the life of A. It, too, is a freehold estate held in freehold tenure.

The fee simple is the largest estate known to the law. Taken in its strict signification, it must be free from all conditions, and all restrictions, and all qualifications.<sup>3</sup> But in common speech in every-day use we speak of an estate as a fee simple,

<sup>1</sup> 5 Law Quart. Rev. 42, 43.

<sup>2</sup> 2 Black. Com. 103-106.

<sup>3</sup> 4 Kent's Com. 4, 5; 1 Preston on Estates, 475, 476.

provided it is limited to a man and his heirs, or provided that it is in effect so limited although not so in form, even though there may be some restriction or condition or qualification annexed to it. Mr. Challis, a late eminent writer upon real property, speaks of a condition subsequent annexed to an estate limited to a man and his heirs as "external,"<sup>1</sup> and Mr. Smith, in his celebrated essay, speaks of it as "collateral"<sup>2</sup> to a fee simple, — the great point being that it may fairly be called a fee simple notwithstanding the condition annexed, because it is to a man and his heirs; and it is common usage to speak of such estates as fees simple. We shall hereafter do as others do, and call any estate limited to a man and his heirs a fee simple, whether there be some condition or restriction or qualification associated with it or not. But the fee simple pure or absolute must be free from all such provisions.

Besides the pure fee simple or fee simple absolute we will enumerate five estates of inheritance which are less in quantity than the fee simple, and yet are more in quantity than a mere life estate, because they are estates of inheritance: (1) The fee simple conditional at the common law; (2) The fee tail, or estate tail; (3) The base fee; (4) The fee upon condition, or conditional fee; (5) The fee upon limitation, or upon special or collateral limitation. This latter is one of the forms of the determinable fee. Although we speak of the base fee as constituting one class, yet eminent writers frequently regard the words "base," "qualified," and "determinable" as convertible terms, and for most practical purposes these three words may be used interchangeably.<sup>3</sup> To show how freely the books use language, the fee simple conditional at the common law is spoken of as a fee simple.<sup>4</sup> As will later appear, it was not a

<sup>1</sup> Challis, R. P. 206.

<sup>2</sup> Smith's Essay, § 36.

<sup>3</sup> 4 Kent's Com. 9; Tied. R. P. § 44; 1 Wash. R. P. 62. See further, 2 Black. Com. 109; U. S. Co. v. Del. R. R., 41 Atl. Rep. 763 (N. J.).

<sup>4</sup> 2 Preston on Estates, 328, 331, 339-341; Willion v. Berkley, Plowd. 235 *et seq.*; Coke's 2d Inst. 333; Co. Litt. 19 a.

pure fee simple or fee simple absolute, but so great an authority as Sir Edward Coke, in his commentary upon Littleton, says thus, "When all estates were fee simple,"<sup>1</sup> meaning in that connection when the fee simple conditional at the common law was common in England.

We shall postpone the consideration of the three classes first mentioned above and take up the fourth and fifth classes.

But first let us say something more about the language of limitation of a fee. The word "heirs" is indispensable at common law in the limitation of an estate of inheritance, therefore, of course, in a limitation of a fee simple. But in a great many of the states of this country, within a few years, the statutes have dispensed with the necessity of the use of this word "heirs" in the limitation of a fee. But in Massachusetts no such legislation has been accomplished, so that in that State in a deed of land the grant must be to the grantee and his heirs, in order to give him an estate having the quantity of a fee. But even at the common law it has from very remote times been possible to give an estate in fee in a will without the use of the word "heirs,"<sup>2</sup> and in construing a will the courts look to the intention of the testator rather than to the technical language, while in a deed they are, in this particular, bound by the technical language. For instance, take an ordinary Massachusetts deed of land. It will in the premises convey the land to A, the grantee; but later there comes the habendum, which is "to have and to hold," followed by "to him and his heirs and assigns forever." What makes the deed pass a fee is that word "heirs" after the habendum.

In a recent Massachusetts case it is laid down that in deeds made in Massachusetts in the early colonial days a fee could be given without the use of the word "heirs," because at that time conveyancing was but little attended to.<sup>3</sup>

<sup>1</sup> Co. Litt. 19 b.

<sup>2</sup> Co. Litt. 9 b.

<sup>3</sup> Gloucester Water Co. v. Gloucester, 179 Mass. 365, 379.



In England, before the passage of the Wills Act, early in the reign of Victoria (1 Vict. ch. 26), the courts would not allow even a will to pass a fee unless there were something contained therein which indicated the intention by some such clear language as "property," or "estates," or some equivalent expression, assuming that the word "heirs" was absent.<sup>1</sup> But very often in wills of land we find the word "heirs" written in as much as if the document were a deed.

There may, however, be a limitation to a man and his heirs which will not confer a fee. Illustrations are: To A and his heirs during the widowhood of B; to A and his heirs while B resides at Rome. A in these cases has but a life estate, because it cannot possibly endure longer than the lifetime of some living person.<sup>2</sup> But in a limitation to A and his heirs till B returns from Rome, this is a fee; it is not a pure fee simple, but it is a fee, because it may by possibility endure forever.<sup>3</sup> Should B return from Rome, the estate of A instantly ceases; but should B never return from Rome, then upon his death the estate of A becomes a pure fee simple, — a fee simple absolute.

The title to real property is always acquired in one of two ways. It is either acquired by descent, or else by purchase.<sup>4</sup> We have seen that a hereditament is an interest which can be inherited, that is, that upon the death of the ancestor it passes to the heir. This is title acquired by descent. When the

<sup>1</sup> *Hill v. Brown* (1894), App. Cas. 125.

<sup>2</sup> 1 Wash. R. P. 63, 64.

<sup>3</sup> 2 Black. Com. 109, 110.

<sup>4</sup> Title by escheat is regarded by Coke as a title by purchase. But as the lord takes the escheated land by purchase when he has the seignory by purchase, and takes it by descent when he has the seignory by descent, it has been argued by Mr. Hargrave (note 2, Co. Litt. 18 b) that the titles of land should be distributed under (1) purchase, and (2) by act of law; and that under the latter come (a) descent, (b) escheat, (c) "such other titles not being by descent as yet like them accrue by mere act of law." 3 Shars. & Budd, 488, 489; 2 Black. Com. 244, 245; 2 Black. Com. 35, 232, 395, 397, 406, 452 (Hammond's ed.).

title is not acquired by descent, it is acquired by purchase. Therefore a man who gets his title to real estate by will, which is called a devise, is a purchaser. He does not inherit it, and he is as much a purchaser as though he had acquired it by a deed and had paid his money for it. This great distinction runs all through the law of real property, and is fundamental and elementary.

At the common law, land descends by primogeniture. Without at present entering upon an explanation of the method of descent by primogeniture, it is enough to say that land descending by primogeniture descends first to the eldest son and down in the line of his issue, to the exclusion of his brothers and sisters. It is thus perceived that the common law in the matter of descent prefers the male sex to the female sex, although it will appear later, when treating of descent, that a woman may be an heir.

Moreover, the common law in the matter of descent prefers the paternal line to the maternal line. Curiously enough, at common law land can never pass by inheritance upwards lineally, so that at common law a man's father or mother can never be his heir.<sup>1</sup> But the very first persons to take are those lineally downwards. Therefore, as above appears, a man's eldest son is his heir. But suppose that the owner of an estate of inheritance dies and leaves no issue, or that the issue becomes extinct, the land in that case descends to collaterals. In this country a man's father and mother may be his heirs;<sup>2</sup> and since the word "heir" is opposed to the word "ancestor,"<sup>3</sup> a man may be, in law, his father's or mother's ancestor; that is to say, if the father or mother inherit from the son as heir, the son is called the ancestor.

When land is acquired by purchase, if there be no issue for it to descend to upon the death of the purchaser, then at

<sup>1</sup> 2 Black. Com. 208.

<sup>2</sup> 4 Kent's Com. 393.

<sup>3</sup> Co. Litt. 78 b.

common law it goes to collaterals, and, as just said, the paternal line is preferred to the maternal line. If the paternal line be exhausted, it then descends in the maternal line.<sup>1</sup> But at common law when land is acquired by descent, if there be no issue, it descends among collaterals in the line from which it has been derived. If derived from the mother, it goes off in her line; if derived from the father, it goes off in his line, and the books use this expression, rather than go from one line to the other,—it shall escheat.<sup>2</sup>

The courts hold that no man can create a new kind of inheritance. Therefore, if there be a limitation to a man and his heirs on his mother's side, thus limiting the descent to that class of heirs, this limitation as to the mother's side is rejected as surplusage, and the grantee takes a fee simple.<sup>3</sup> In a late Massachusetts case<sup>4</sup> and in a late Maryland case,<sup>5</sup> there was a limitation to a man and his heirs on his father's side. It was held in both of these cases that nobody can create a new kind of inheritance, that the words, "on the father's side," are to be rejected as surplusage, and that the grantee takes a fee simple.<sup>6</sup>

Referring now to the last two of the five classes of estates of inheritance above mentioned, we will take up the conditional fee, or fee upon condition. A condition may be defined as a provision whereby an estate may be made to commence,

<sup>1</sup> 4 Gray's Cas. on Prop. 8.

<sup>2</sup> 4 Gray's Cas. on Prop. 7, 8.

<sup>3</sup> 4 Gray's Cas. on Prop. 8; *Johnson v. Whiton*, 159 Mass. 424.

<sup>4</sup> *Johnson v. Whiton*, 159 Mass. 424.

<sup>5</sup> *Balt. & Ohio R. R. v. Patterson*, 68 Md. 606.

<sup>6</sup> Preston in his work on Estates, Vol. I. pp. 449 *et seq.* and 468 *et seq.*, uses the phrase "qualified fee," in a peculiar sense, to denote a certain form of the fee simple, it being a limitation to one and a particular class of heirs general, that is, to one and "the heirs of an ancestor of his in the paternal line whose heir he happens to be"; thus, a limitation to one and his heirs on the part of his father. 1 Preston on Estates, 449 *et seq.*, 468 *et seq.*; 3 Law Quart. Rev. 399, note, 404, 405; 2 Law Quart. Rev. 394; Littleton, § 354. And see 1 Preston on Estates, 470; Challis, R. P. 43, 45, 215-229.

may be enlarged, or may be defeated upon performance or breach of such provision.<sup>1</sup>

Conditions are either precedent or subsequent; and we shall presently show that conditions are also divided by another classification. A condition precedent is one upon the performance of which the estate will be made to commence, or will be enlarged.<sup>2</sup> A condition subsequent is one upon the breach of which an estate already created may be defeated.<sup>3</sup>

The common words in use to express a condition subsequent are "provided that" and "on condition." These two phrases have a technical import. But it is always a question of construction what any language in a given case may be taken to import. When the language is equivocal, the courts lean toward the construction of a condition subsequent, rather than toward that of a condition precedent. Nor is this rule of construction confined to property law, but it is a general rule, and in the case of property law the reason given is that the courts favor the vesting of estates; that is, they prefer to let the estate vest subject to its being thereafter defeated by breach of the condition subsequent, rather than to prevent it vesting until the happening, if ever, of the contingent event.

As to conditions subsequent, it is a very elementary and fundamental rule of common law that they can only be reserved to the grantor and his heirs.<sup>4</sup> Suppose, for illustration, that X owns land in fee simple. Suppose he conveys that land to A and his heirs, and annexes some condition subsequent for breach of which the estate of A may become forfeited. X cannot reserve the benefit of the condition to anybody but himself and his heirs. Moreover, the condition is unassignable, and any attempted assignment of it not only passes nothing to the grantee thereof, but actually extinguishes the right

<sup>1</sup> 2 Black. Com. 154.

<sup>2</sup> 2 Black. Com. 154.

<sup>3</sup> 2 Black. Com. 154.

<sup>4</sup> 1 Wash. R. P. 445, 450, 451.

itself. This is the rule at common law.<sup>1</sup> By the Statute 32 Hen. VIII. conditions were made assignable if the granted estate were for life or for years. Suppose, then, that in the above case the grant to A instead of being in fee simple were to him for life or for years, this would leave a reversion in X, and should he assign his reversion, the right under the condition would pass with it and would not be extinguished. But it is only in the cases of estates for life and for years that this statute applies.<sup>2</sup> So that in the case first put the law, obtains to-day as of old, that any attempted assignment of a condition subsequent extinguishes it.

Another important feature of the condition subsequent is that the right to enforce a forfeiture for the breach thereof is not perfected without an entry upon the land.<sup>3</sup> Until the party entitled has made an entry upon the land, he has not an estate in the land, but a mere right of entry; he has no higher property right after breach than before, unless he has entered. We shall see that this is quite different from the right of the party entitled when the words are words of limitation and not words of condition subsequent.

Conditions are also divided into express and implied. An express condition is also called a condition in deed. An express condition is one expressly mentioned or contained in the instrument, that is, the deed or the will. An implied condition is one implied by law, and we shall mention the chief form thereof. The implied condition under which certain

<sup>1</sup> Co. Litt. 214 a.

<sup>2</sup> Littleton, § 347; Co. Litt. 214 a, b. See further, Preston in his edition of Shep. Touch. 149, 151, 153, 154; Viner's Abr. 311, "Condition," note (d), pl. 10, 11.

<sup>3</sup> 1 Wash. R. P. 445, 450, 451. It seems that a provision is good which provides that the devisee shall lose the estate upon permanently removing from the United States, or upon removing any considerable portion of the estate out of the United States; also, that such a provision, if containing language implying a power to sell, may confer a good title upon the purchaser, and yet that the forfeiture clause may apply to the proceeds of the sale. But these points were not decided. *Hunting v. Damon*, 160 Mass. 441, 443, 444.

estates were taken was, at common law, that the tenant should not create a fee; and should he do so, it exposed his estate to be forfeited. The tenants here contemplated are tenants for life and tenants for years.<sup>1</sup> Indeed, the same principle applied to tenancies of less quantity in land than terms of years, for the same principle applied to tenancies at will and tenancies at sufferance.<sup>2</sup> But we will take in respect to these mere chattel interests the tenancy for years as a typical case. If, then, a tenant for life or a tenant for years made a feoffment in fee, levied a fine, or suffered a common recovery, thus creating in the grantee a fee, he exposed his estate to be forfeited, and exposed the fee he had created to be destroyed. By this tortious conveyance he broke the implied condition upon which the estate was granted to him, and the party whose rights were thus invaded had an immediate right of entry.<sup>3</sup>

As to the fine and common recovery, we have already mentioned that they operated as conveyances of land, and they were very common modes of conveying land in England. Indeed, the three great kinds of conveyance of land in England were the feoffment, the fine, and the common recovery, all of them being conveyances at the common law. After the Statute of Uses was passed, in the reign of Henry VIII., a new set of conveyances came greatly to be used for conveying the legal estate in land. But the common-law conveyances of feoffment, of fine, and of common recovery still continued to be used to a considerable extent. Fines and recoveries are now abolished in England by statute; but nobody can examine a point of real-property law intelligently without knowing what is meant so abundantly in the books by these forms of conveyancing. As these conveyances have never been much in use in the United States and now are obsolete in England,

<sup>1</sup> 1 Wash. R. P. 91, 450; Tied. R. P. §§ 64, 271; 1 Greenleaf, Cruise, 109; 2 Shars. & Budd, 359, 360 *et seq.*

<sup>2</sup> Butler's note to Co. Litt. 330 b.

<sup>3</sup> See the authorities in note 1, above. Butler's note to Co. Litt. 330 b.

we will not take the space to describe their machinery ; but an explanation of their methods can be found in Blackstone's Commentaries and in several of the text-books.

If, then, a tenant for life or a tenant for years created a fee by either of these three conveyances, this operated as a disseisin of the reversioner or remainderman.<sup>1</sup> He was the party damaged by this tortious act of the tenant in possession of the land, and he could proceed to regain the possession of the land from the grantee in fee. In case the particular estate was a term of years, the act of the tenant in creating a fee was in derogation of the actual seisin of the reversioner or remainderman. In case the particular estate was an estate for life, the act was in derogation of the seisin in law of the reversioner or remainderman. Now, since a mere tenant for years has not the seisin as already shown, the seisin, since it must always be somewhere, must be in the reversioner or remainderman. Suppose, then, that the owner of land in fee simple makes a lease of it to A for years, for example for five or ten years, what is left in the lessor is a reversion. Since he has not parted with his seisin, he will remain actually seised, although he has given the possession of the land to the tenant. Suppose that this lessor leases the land to A for years, remainder to B and his heirs ; this means that upon the expiration of the term of years B is to have the possession of an estate in fee simple. To be very precise, the particular estate being merely for years, this remainder is called not a true remainder but a so-called remainder. Should, then, A convey the land by feoffment, fine, or recovery to X and his heirs, thus creating a fee simple, it would operate as a disseisin of the reversioner or remainderman, depriving him of his actual seisin, and he could regain the possession of the land immediately by an entry. Suppose, next, that A be a tenant for life ; conceive, for instance, that the owner of the land had made a feoffment of it to A for life, A has the actual seisin of the land ; and the books

<sup>1</sup> 4 Kent's Com. 483-490.

speak of the interest of the reversioner as seisin in law. And so if the owner has made a feoffment to A for life, with remainder to B and his heirs, B, the remainderman, is said to be seised in law. So, in such cases, the act of A in creating a fee in X and his heirs is in derogation of the seisin in law. But all that is meant by seisin in law in such cases is that the inheritance of the estate is to be found in the reversioner or remainderman, as the case may be.<sup>1</sup>

In Massachusetts and in various other states there are statutes which provide that a conveyance by a tenant for life or a tenant for years shall not operate to pass more than his own interest; in other words, that it shall merely operate as an assignment of the estate or interest.

It has been a puzzle how it happened that a mere tenant for years could create a freehold estate, and Professor Maitland, of Cambridge University, England, and Professor Hammond, of America, have suggested that this principle probably is to be referred to that ancient time, when, as we have already mentioned, seisin meant possession, and was applied to the possession of land, even though the tenant had a mere chattel interest, and that the tenant's feoffment transferred this possession and created whatever estate he might see fit by his conveyance to create.<sup>2</sup>

We come now to the last one of the classes above mentioned, — fees upon limitation, or upon special or collateral limitation. The words used in creating estates of this kind are words indicating time or duration, such words as "until," "while," "so long as," and similar words. These words are quite different from words of condition above mentioned, and when the contingent event occurs, if ever, the party entitled to the possession does not, as in the case of breach of condi-

<sup>1</sup> Williams on Seisin, 68, citing Watkins on Descents, 27.

<sup>2</sup> Professor Maitland in 2 Law Quart. Rev. 488, 489; Professor Hammond in 2 Black. Com. 253, 526-530 (Hammond's ed.). See further, Butler's note to Co. Litt. 330 b.



tion subsequent, have to make an entry on the land; for the estate upon limitation expires, runs out, and, having come to an end, the party having the reversionary interest is in, without the formality or necessity of an entry to reinstate him. The words of limitation mark the bounds of the estate. When the contingent event occurs, the estate is not abruptly broken up, cut short, by the entry of the party entitled to enter for breach of condition, but the estate has simply expired of itself;<sup>1</sup> for instance, to A and his heirs until B returns from Rome. Now, that expression "until B returns from Rome" is a clause of limitation annexed, which limits what would otherwise be a pure fee simple. This clause is special, because it marks the bounds of the estate; and it is collateral to the limitation to A and his heirs, and is a special or collateral limitation; and should the contingent event occur by the return of B from Rome, the estate of A *ipso facto* ceases. There is no cutting short of A's fee, as would be the case if the language were that of condition subsequent.<sup>2</sup>

If the outstanding estate upon limitation be a fee, as in the case here put, the reversionary interest is called a possibility of reverter, and it is not assignable unless made so by statute.<sup>3</sup> But if the outstanding estate be less than a fee, the reversionary interest is assignable even at common law.<sup>4</sup>

A fee upon limitation is called a qualified or determinable fee.<sup>5</sup> But a determinable fee is not necessarily a fee upon limitation. The expression "determinable fee" is used more broadly. It will include a case in which we do not use

<sup>1</sup> 2 Black. Com. 155.

<sup>2</sup> Gray on Perp. §§ 31, 32; *Newis v. Lark*, Plowden, 403, 405, 414.

<sup>3</sup> 4 Kent's Com. 259; Cornish on Rem. 178; 2 Preston's Abstr. 104, 105; Tied. R. P. §§ 385, 398; 2 Wash. R. P. 802 (5th ed.); *Nicoll v. R. R. Co.*, 12 N. Y. 134; *Pearse v. Killian*, 1 McMullan, Eq. (S. C.) 233; 1 Fearn on Rem. 381, note; *Trustees v. Venable*, 42 N. E. Rep. 836 (Ill.).

<sup>4</sup> Littleton, § 347; Co. Litt. 214 a, b; *Shep. Touch.* (Preston's ed.) 150, 151.

<sup>5</sup> 1 Preston on Estates, 45, 127, 430-433, 481 *et seq.* See further, *Challis*, R. P. 201-206.

words of limitation, and in which upon the happening of the contingent event the fee is to go over to some third party. Thus, to A and his heirs, but if he die without having had any issue, then to B. and his heirs. The estate of A is a determinable fee ; and the limitation over to B is good in devises, and is good in conveyances operating under the Statute of Uses. But it is not good at common law, for it is a fee mounted upon a fee, and this cannot be done at common law.<sup>1</sup>

<sup>1</sup> 1 Preston on Estates, 433, 434.

## CHAPTER V.

## THE LIFE ESTATE.

No interest in land of less quantity than an estate for life, either for the tenant's own life or for the life of another person, is a freehold estate; but such estates are freehold estates, and so are all estates of a larger quantity than these. Estates of a larger quantity than these are estates tail, and all the different kinds of fees.<sup>1</sup>

It is very common in the every-day drafting of wills and deeds to express a limitation made to somebody for the period of his lifetime; thus, for the term of his natural life. The reason for this common usage is that, at common law, if the gift be to a man for his life, his estate may be made to cease while he is still living, because of his civil death. Thus, if he enter into a monastery he becomes dead in law. The result is that the usage has grown up of expressing a limitation to one for the period of his lifetime, as for and during the term of his natural life.<sup>2</sup>

A limitation to A confers upon him an estate for his life, because the word of inheritance is wanting, to wit, the word "heirs," so that it cannot be an estate of inheritance;<sup>3</sup> and there is no expression limiting it to a period of time measured in days, years, or months; so that it cannot be a term of years, and it is as much a life estate as if expressed to be to A for his life.<sup>4</sup>

<sup>1</sup> Litt. § 57; Co. Litt. 43 b.

<sup>2</sup> 2 Black. Com. 121.

<sup>3</sup> 2 Black. Com. 121.

<sup>4</sup> 2 Black. Com. 140. If a tenant in tail make a lease to A, without specifying for anybody's life, this means for the life of the grantor, because the law will presume that the grantor intended to do no wrong; and

Estates for life at common law are created by livery of seisin as much so as are fees, and frequently under feudalism the tenants for life swore fealty.<sup>1</sup>

What we have shown in the preceding chapter respecting the fee is equally true of a life estate. Just as the fee may be upon condition, so may a life estate be upon condition; and just as the fee may be upon limitation so may a life estate be upon limitation. This latter sufficiently appears in our illustration given in the preceding chapter, in which we show that a limitation to A and his heirs during the widowhood of B is but a life estate. This life estate is upon limitation, and will expire upon the marriage of B, even though A be still living; and we showed in that connection that the estate was but a life estate, even though limited to A and his heirs.

Under the ancient common law a judgment recovered against the tenant for life by one who claimed in his suit the inheritance did in certain cases operate as conclusive against the owner of the reversion or remainder.<sup>2</sup> It, therefore, was competent for the tenant for life to call into court the reversioner or remainderman to help defend the action. The freehold tenant was called tenant to the *præcipe*. A *præcipe* was a writ to recover a freehold. If there were a mere tenant for years in possession of the land, and an action should be brought to recover the freehold, he would call upon the freeholder to come in and defend the action. If there were a tenant for life in possession he would be tenant to the *præcipe*, and he would call upon the owner of the inheritance, who would either be the reversioner or else the remainderman, to come in and defend the action. This calling upon some person who had an interest or estate of greater value than that of the

it would be a wrong for the tenant in tail to encumber the property with an estate which might be of longer duration than for his own lifetime. Co. Litt. 42 a.

<sup>1</sup> 2 Black. Com. 120.

<sup>2</sup> Tied. R. P. § 65; 2 Pollock & Maitland, 10; 1 Pollock & Maitland, 339, 341.

tenant in possession was called "praying in aid"; and the reversioner or remainderman had the right to come in and defend, and thus protect his estate from the effect of a judgment, or, rather, protect his estate by preventing a judgment in favor of the party bringing the action, by coming in on his own motion.<sup>1</sup>

Under modern law a judgment recovered against the tenant for life by one who claims the inheritance does not prejudice the reversioner or remainderman.<sup>2</sup> And so under modern law a disseisin of the tenant for life does not prejudice the reversioner or remainderman.<sup>3</sup> Under the modern law, when the tenant for life has been disseised the statute of limitations does not begin to run against the reversioner or remainderman until the expiration of the estate for life.<sup>4</sup> No act done by a tenant for life, either by purchasing an adverse title or by claiming the ownership of the land to be in himself, can operate to the prejudice of the reversioner or remaindermen.<sup>5</sup>

Tenants for life and tenants for years are entitled to take reasonable estovers from the land in which they have their estate or interest. Estovers are house-bote, which also includes fire-bote. House-bote is a reasonable allowance of timber for the repair of the buildings upon the land, except that fire-bote is a reasonable allowance of wood for fuel. Plough-bote and cart-bote are wood for the repair of the implements of husbandry, and hay-bote or hedge-bote is wood for the repair of hedges or fences.<sup>6</sup>

<sup>1</sup> 1 Wash. R. P. 39 and note, 48; 4 Kent's Com. 24; Tied. R. P. § 65; 2 Pollock & Maitland, 10.

<sup>2</sup> Tied. R. P. § 65.

<sup>3</sup> Tied. R. P. § 65.

<sup>4</sup> 2 Shars. & Budd, 306, 307; *Clark v. Parsons*, 39 Atl. Rep. 899 (N. H.); *Simis v. McElroy*, 54 N. E. Rep. 674 (N. Y.).

<sup>5</sup> *Schroeder v. Tomlinson*, 39 Atl. Rep. 484 (Conn.); *Nelson v. Davidson*, 43 N. E. Rep. 363 (Ill.); *Dalton v. Fitzgerald* (1897), 1 Ch. 440; affirmed on appeal in (1897) 2 Ch. 86. See *Chase v. Chase*, 37 Atl. Rep. 804 (R. I.).

<sup>6</sup> 2 Black. Com. 35.

Emblements are the crops which a person is entitled to, in case the estate or interest of the tenant who sowed the crops expires before harvest. Emblements are allowed when the period of the duration of the estate or interest is uncertain. Therefore, if a man have an estate for his own life in land, and sow a crop and die before harvest, emblements are allowed his representative. And so if a tenant at will sow a crop, and his interest is terminated, but not by his own act, before harvest, he is entitled to emblements. But a tenant for years whose interest is not limited upon any contingency is not entitled to emblements, because his interest is for a definite period of time.<sup>1</sup>

Waste may be committed by various persons having the possession of land, and among other persons by tenants for life and tenants for years. Waste is of two sorts, — voluntary, and involuntary or permissive. The statutes of Marlebridge (52 Hen. III. ch. 23), of Gloucester (6 Edw. I. ch. 5), and of Westminster 2d (13 Edw. I. ch. 22) contain enactments relating to the subject of waste. The ancient real action of waste is based partly upon the common law and partly upon ancient statutes. It was a very technical action, and could only be brought by one who had an immediate estate of inheritance. The penalties under the ancient law which could be imposed upon tenants for life or years in an action of waste were the forfeiture of the premises and treble damages. Other remedies are afforded by the common law besides that just mentioned; and a court of equity extends its jurisdiction in proper cases to the prevention of waste by the writ of injunction.<sup>2</sup> The subject of waste is now regulated everywhere by statutory systems, so that we will not give more space thereto. The law in the United States is more liberal in respect to what shall amount to waste than is the law of England. A tenant in the United States is permitted to

<sup>1</sup> 2 Black. Com. 122, 123, 145.

<sup>2</sup> 3 Black. Com. 223, 228; Co. Litt. 53 b.

do many things which are not allowed to him by the law of England.<sup>1</sup>

A tenant for life is bound to pay the interest on incumbrances.<sup>2</sup> But a tenant for life is not bound to insure.<sup>3</sup> A tenant for life is bound to pay the taxes assessed upon the premises.<sup>4</sup> If improvements be really necessary, or be authorized by the will under which an equitable tenant for life claims, he, upon paying for them, is entitled to be indemnified out of the principal of the estate.<sup>5</sup>

An estate *per autre vie* is an estate for the life of another person; thus, to A during the lifetime of B. A has an estate

<sup>1</sup> In *West Hamp. Co. v. East London Co.* (1900), 1 Ch. 624, it was held to be waste to raise the surface of land. See further, 14 Harv. Law Rev. 226. It is said in *Harrison v. Pepper*, 166 Mass. 289, that it is not altogether clear how far a tenant for life is liable for permissive waste. See further to this point, *In re Cartwright*, *Avis v. Newman*, L. R. 41 Ch. Div. 532, that a tenant for life is not liable for permissive waste, and see 42 Atl. Rep. 712 (N. J. Ch.). But see *Davies v. Davies*, 38 Ch. Div. 504. As to whether a tenant for life is bound to make repairs, see *In re De Teissiens' Estates* (1893), 1 Ch. 153; *In re Redding* (1897), 1 Ch. 876; *In re Freeman* (1898), 1 Ch. 32. As to leaseholds, see 34 Ch. Div. 136; *In re Redding* (1897), 1 Ch. 876; *In re Montagu* (1897), 2 Ch. 8; *In re Tomlinson* (1898), 1 Ch. 232; *In re Gjers* (1899), 2 Ch. 54; *In re Parry v. Hopkins* (1900), 1 Ch. 160. It has been held to be waste for a tenant for life to fail to pay the taxes. *Stetson v. Day*, 51 Me. 434.

<sup>2</sup> *Steward v. England* (1895), 2 Ch. 107; *Steward v. England* (1895), 2 Ch. 820; *Townson v. Harrison*, 43 Ch. Div. 59-61; *Ivory v. Klein*, 35 Atl. Rep. 346 (N. J.); *Weber v. Lauman*, 45 Atl. Rep. 872 (Md.).

<sup>3</sup> *Harrison v. Pepper*, 166 Mass. 288.

<sup>4</sup> *Stetson v. Day*, 51 Me. 434. In *In re Freeman* (1898), 1 Ch. 32, it is said that the loss of income arising from the making of repairs must fall upon the life tenant, (1) whether personalty belonging to the estate is used for that purpose, or (2) whether the money be borrowed on mortgage (page 33). There was a trust in behalf of A for life, and after his death in behalf of his children. The children already born were infants. It would have been advantageous to mortgage the property to raise money to rebuild, because it would have much increased the value of the estate. It was held that chancery had no jurisdiction to authorize a mortgage to be made, for that it was not a case of salvage; that is, it was not a case in which the buildings were falling down. *In re Montagu* (1897), 2 Ch. 8 (Ct. of Appeal); *In re Willis* (1902), 1 Ch. 15. See *Baldrige v. Coffey*, 56 N. E. Rep. 411 (Ill.).

<sup>5</sup> *Stevens v. Melcher*, 46 N. E. Rep. 965 (N. Y.).

during the lifetime of B. B is called the *cestui que vie*, that is, the person for whose lifetime the estate is limited. An estate *per autre vie* was in very ancient times a mere chattel interest,<sup>1</sup> but for ages it has been a freehold estate at common law. It is regarded technically as of less value than an estate for the tenant's own life,<sup>2</sup> and yet it may practically prove on some contingency to be more valuable. Thus, to A for the life of B; should A die, B surviving, A's estate will continue after his (A's) death; whereas were it an estate to A for his own life, his estate would cease upon his death. If at the common law there be a limitation to A for the life of B, remainder to A for his own life, this estate *per autre vie* being smaller than the other estate, and the two estates being several and distinct estates, will merge in the estate in remainder, so that the effect will be that A will come into possession immediately of an estate for his own life only. On the other hand, if there be at the common law a limitation to A for his own life and for the lives of B and C, this is not a case of several and distinct estates, but it is one entire and undivided estate, and there will be no merger.<sup>3</sup>

An estate *per autre vie* may be limited to A for the life of B. It may likewise be limited to A and his heirs for the life of B. This latter is not a fee, though words of inheritance are present, because it cannot by possibility endure beyond the lifetime of somebody now living. Each of these estates is assignable by the tenant, but if he has not assigned it and dies before the *cestui que vie*, then at the common law there would be in the one case general occupancy and in the other case special occupancy. General occupancy would apply to the limitation to A for the life of B. Upon the death of A, B surviving, anybody could enter and take possession of the land

<sup>1</sup> 2 Pollock & Maitland, 80, 81.

<sup>2</sup> Co. Litt. 41 b.

<sup>3</sup> 3 Preston on Conv. 58, 404; Brudnel's Case, 5 Rep. 9 a, b; Rosse's Case, 5 Rep. 13 a; Co. Litt. 41 b. See *Snow v. Boycott* (1892), 3 Ch. 110.



until B should die. The persons thus entering were called general occupants. But if the limitation were to A and his heirs during the life of B, upon the death of A, B surviving, the heirs of A were entitled to enter and take possession as special occupants. In the case of a limitation to A for life, suppose that A assigns to B and B dies, A surviving, this having become an estate *per autre vie* by the assignment, general occupants could enter.<sup>1</sup> This matter of general and special occupancy is not a part of the law of this country, but all the text-books touch upon this. A limitation to A and B and their heirs in equal shares for their lives respectively and the life of the longer liver of them, is an estate *per autre vie*.<sup>2</sup>

Before the Statute of Frauds an estate *per autre vie*, though limited to A and his heirs, could not be taken for the debts of the ancestor upon the estate passing to the heir of A, even though it were a specialty debt, because the heir did not take by descent, but took as special occupant. Lord Kenyon therefore objects to calling an estate *per autre vie* limited to A and his heirs a descendible freehold, because it does not, strictly speaking, descend.<sup>3</sup> Under the ancient law of England the heir was not liable for simple contract debts, but only for specialty debts, and he was not liable even for these unless he was named in the instrument.<sup>4</sup> Before the Statute of Frauds an estate *per autre vie*, even though limited to A and his heirs, could not be devised; but the Statute of Frauds provided that an estate *per autre vie*, whether limited to A or to A and his heirs, may be devised, and that if it be limited to A and his heirs, and be not devised, and come to the heir as

<sup>1</sup> Co. Litt. 41 b.

<sup>2</sup> *In re Sheppard* (1897), 2 Ch. 67.

<sup>3</sup> *Inman v. Inman* (1903), 1 Ch. 246 (Ct. of Appeal).

<sup>4</sup> *Mackin v. Haven*, 58 N. E. Rep. 448, 451 (Ill.); 2 *Jarman on Wills* (6th ed.), 1430, note 1; 2 *Black. Com.* 465, note by Chitty (Shars. ed.); 2 *Pollock & Maitland*, 345; *Myers v. Weger*, 42 Atl. Rep. 281 (N. J.); *Ransom v. Brinkerhoff*, 38 Atl. Rep. 923 (N. J.).

special occupant, it shall be liable for debts the same as if it were assets received by descent; and, further, that if there be no special occupant it shall go to the executors or administrators, and be assets in their hands.<sup>1</sup>

In the United States, in some localities the statutes make the estate *per autre vie* to be transmitted as a chattel interest; but the Massachusetts statute provides that an estate *per autre vie* shall descend like a fee simple.

<sup>1</sup> *Inman v. Inman* (1903), 1 Ch. 246 (Ct. of Appeal).

## CHAPTER VI.

## DOWER.

WE will now take up the subject of Dower. Dower is a derivative estate. It is derived from an estate of inheritance of the husband, and belongs to his wife. He must have seisin of the estate of inheritance at some time during coverture, that is, at some time during the marriage.<sup>1</sup> If the wife survive him she is entitled to have her dower assigned to her, and it is in her an estate for the term of her natural life in one-third part of the land.<sup>2</sup> Another element in a strict definition is added, which is that the estate of inheritance of the husband must be one which the issue of the marriage, if any, may by possibility inherit.<sup>3</sup> This is quite different from the great principle of curtesy, soon to be considered, which requires that

<sup>1</sup> 2 Black. Com. 129; *Phelps v. Phelps*, 143 N. Y. 197, discussed in 2 University Law Review, 73, 74, 333 *et seq.* Although at common law the husband must be seised at some time during coverture, yet by virtue of statutes dower is now given in England and in this country very generally in equitable estates. 1 Wash. R. P. 160-163; 4 Kent's Com. 30, 44; 2 Black. Com. 132 (Shars. ed.), note 20; *Reed v. Whitney*, 7 Gray, 536.

But the common-law rule obtains in Massachusetts (*Reed v. Whitney*, 7 Gray, 537; *Brooks v. Everett*, 13 Allen, 458; *Simonds v. Simonds*, 112 Mass. 164; *Lobdell v. Hayes*, 4 Allen, 190), subject to a trifling exception, which is as follows: Under the Massachusetts statutes, if a married man contracts to buy a piece of land, the title to pass at a future day, and die before that day, his widow is entitled to dower in the land out of the equitable estate created by his contract. *Reed v. Whitney*, 7 Gray, 533; *Lobdell v. Hayes*, 4 Allen, 187; *Shearer v. Shearer*, 98 Mass. 117. In Massachusetts, by statute, terms of one hundred years or more are subject to dower, provided that fifty years or more remain unexpired. Mass. Rev. Laws, ch. 129, § 1.

<sup>2</sup> 2 Black. Com. 129.

<sup>3</sup> Litt. § 53; *Tudor's Lead. Cases* (3d ed.), 73; 2 Black. Com. 131.

there should be issue of the marriage, for in dower there is no such necessity. This last-mentioned element of dower is only valuable in this country as a matter of strict definition, because it contemplates the case of the estate tail special, and this is not often found in the United States. If land be given to A and the heirs of his body on his wife B begotten or to be begotten, this is a case of the estate tail special. It is an estate of inheritance, and should the wife die, her husband surviving and issue of the marriage surviving, he would still have an estate tail special. Should he marry again, his second wife would not have dower in that land, because by no possibility could the issue of that second marriage, if any, inherit it.<sup>1</sup> On the other hand, suppose that an estate tail special be limited as above stated, and that the husband die, his wife surviving him, she is entitled to dower, because he was seised at some time during the coverture of an estate of inheritance which the issue of the marriage, if any, could by possibility inherit.<sup>2</sup>

Magna Charta provided that a widow should have the right to remain in the chief house of her husband, if not a castle, for forty days after his death. This is called the widow's quarantine; and Magna Charta further provided that she should be endowed of one-third part of his lands, unless she were endowed of less at the church door.<sup>3</sup> This merciful provision of Magna Charta which allows the widow to remain in the house has been a great protection to widows, because upon the death of the husband the heir becomes immediately entitled to possession of the land; and while a son would not be likely to turn his mother out of doors, yet perhaps he might treat his stepmother that way. The American statutory systems in general provide for the widow's quarantine, and allow her to remain in the house of her husband for a certain length of

<sup>1</sup> Litt. § 53; Tudor's Lead. Cases (3d ed.), 73; 2 Black. Com. 131.

<sup>2</sup> Litt. § 53; Tudor's Lead. Cases (3d ed.), 73.

<sup>3</sup> 1 Wash. R. P. 150.

time after his death without paying rent to the heirs of her husband.

By statute in some of the states dower is given in lands of inheritance of which the husband dies seised,<sup>1</sup> but this is not common-law dower. Thus in Massachusetts there is common-law dower, and it therefore becomes necessary when a married man conveys an estate of inheritance in land to have his wife

<sup>1</sup> The dower right until an assignment of dower has been made is regarded at law as a mere chose in action. 1 Wash. R. P. 312 (5th ed.). But equity has protected it in many cases. 1 Wash. R. P. 216, note, 305, note (5th ed.); *Stroup v. Stroup*, 39 N. E. Rep. 864 (Ind.); 3 U. S. Cir. Ct. of App. 316-319, note; *Duttera v. Babylon*, 35 Atl. Rep. 65 (Md.); *Clifford v. Kampfe*, 42 N. E. Rep. 1 (N. Y.). And in case of the transfer of the dower right after the husband's death, but before the dower has been assigned to the widow, equity will protect the rights of the grantee. 1 Wash. R. P. 251, 252; *McMahon v. Gray*, 150 Mass. 290, 291; *Ritt v. Dodge*, 37 Atl. Rep. 810 (R. I.); *Fletcher v. Shepherd*, 51 N. E. Rep. 212 (Ill.); *Sloniger v. Sloniger*, 43 N. E. Rep. 1111 (Ill.); *Salem Bk. v. White*, 42 N. E. Rep. 312 (Ill.); *Field v. Lang*, 32 Atl. Rep. 1004 (Me.); *Tenbrook v. Jessup*, 46 Atl. Rep. 516 (N. J. Ch.). See further 1 Shars. & Budd, 330, 331; *Ward v. Ward*, 57 N. E. Rep. 1095 (Ohio); 36 Am. St. Rep. 22, note. But see *Haggerty v. Wagner*, 48 N. E. Rep. 366 (Ind.); *Mills v. Ritter*, 47 Atl. Rep. 194 (Penn.). The assignment of dower is either of common right or against common right, and the consequences arising from either of these modes of assignment differ in this respect, that if the assignment be of common right and there be an eviction of the heir or of the dowress from a part of the premises, there may be a readjustment; otherwise, if the assignment be against common right. This is the general rule. *Fuller v. Rust*, 153 Mass. 46. Dower and curtesy are interests in the land in which the husband or wife has an estate of inheritance; but a husband and wife have under the statutes of the different states interests in each other's property of which the one cannot be deprived by the will of the other. These interests may yet be protected, so that if a husband conveys his property to a third party for the purpose of depriving his wife of her statutory interests, should she survive him, the court will in certain cases set aside the conveyance after the husband's death. *Brownell v. Briggs*, 173 Mass. 529; *Leonard v. Leonard*, 181 Mass. 458. In Massachusetts, if land be taken by right of eminent domain, and there be an inchoate dower right in the land, the wife is not entitled to have any portion of the money received for the land paid to her either directly, or set aside for her benefit on the contingency of her surviving her husband. *Flynn v. Flynn*, 171 Mass. 312. But see *Haggerty v. Wagner*, 48 N. E. Rep. 368 (Ind.). As to the effect of dedication in some jurisdictions upon inchoate dower see *Haggerty v. Wagner*, 48 N. E. Rep. 368 (Ind.).

release her dower; and if she has not done so, then upon his death, she surviving, she is entitled to have her dower assigned to her in the land.<sup>1</sup>

There is dower in the corporeal hereditament, and the expression of the books is "in such incorporeal hereditaments as savor of the realty."<sup>2</sup> Now a reversion of an estate of inheritance subject to a freehold particular estate is an incorporeal hereditament; and a remainder of an estate of inheritance subject to a freehold particular estate is an incorporeal hereditament.<sup>3</sup> But there can be no dower in such reversions

<sup>1</sup> A widow may under the statutes waive the provisions of her husband's will in her behalf, and elect to take her dower and her share of his estate given her by statute. There was a devise and bequest of a residue in trust, the income of one-half to the testator's son A and of the other one-half to the testator's wife and another son B, until B shall reach twenty-one years of age, after which time one-fourth of the total income to be paid to the wife for life, and one-fourth to B. The widow waived the provisions of the will. It was held that before B shall become of age the income of one-half would be payable to the widow and B jointly; so that the income upon that one-half became payable to B alone, as the widow had waived the provisions of the will. But by her doing so, the incomes of both A and B had become diminished. Therefore, the income upon the one-fourth which the widow would have taken after B should become of age would be divided, after B should become of age, between A and B in the proportions in which they were respectively disappointed. A being given twice as much as B, A was disappointed two dollars for one. Therefore, the income upon this one-fourth, after B shall become of age, is to be divided into thirds, A receiving two-thirds thereof and B one-third thereof during the lifetime of the widow, and the remaining income is divided in the same ratio. The rationale of this is, that the widow has entrenched upon the income of the estate, taking not only one-fourth but something in addition. The result is, that what is left of the income of the estate is to be divided between A and B in the ratio of two-thirds and one-third, because that is the proportion in which they are entitled to the income as provided in the will. The one-fourth which is really here under consideration is the one-fourth of what constitutes the estate passing under the will; and that is one-fourth of what is left after the widow has taken out her share given her by law. This one-fourth is not to be treated as intestate estate, but is equitably to be divided between A and B in the above proportions. *Shreve v. Shreve*, 176 Mass. 456.

<sup>2</sup> 1 Scribner on Dower (2d ed.), 198.

<sup>3</sup> Williams, R. P. \*241; 1 Wash. R. P. 11; 1 Law Quart. Rev. 336, 337; Gray on Perp. § 16, note 1.

and remainders,<sup>1</sup> though it seems to us that we may say they savor of the realty. An illustration of that class of incorporeal hereditaments which savor of the realty is a rent. Suppose that X, the owner of land in fee simple, grants a rent to A and his heirs to issue out of the land, there is dower in this rent. Suppose X, the owner of land in fee simple, conveys it to A and his heirs and reserves a rent to issue out of the land to himself and his heirs, there is dower in the rent.<sup>2</sup>

We wish now in this connection to refer to actual seisin and seisin in law, and this will enable us to see why there is no dower in these reversions and remainders. As we have said in a previous chapter actual seisin is the possession of land by one claiming a freehold estate therein. We have seen that seisin in the husband at some time during the marriage is essential to give the right to dower, but this seisin need not be the actual seisin. Seisin in law is sufficient, provided, however, that it be coupled with the right to have immediately the actual seisin.<sup>3</sup> Suppose, then, that there be a limitation to A for life, the remainder to B and his heirs, and suppose B die, A surviving, the widow of B is not entitled to dower; for even if we speak of B as seised in law, yet he at the time of his death had not, nor at any other time had he, the right to the actual seisin. He would not become entitled to that during the existence of the particular estate for life in A. And so if there be a limitation to A for life, the grantor who has the reversion is at no time during A's lifetime

<sup>1</sup> 1 Scribner on Dower (2d ed.), 229, 230. Even when dower is allowed by statute in an equitable estate, it is the rule that there is no dower in an equitable estate in remainder. 1 Scribner on Dower (2d ed.), 407; Williams, R. P. (17th Eng. ed.) 299; *Hall v. Hall*, 47 Atl. Rep. 79. But in Connecticut, under the statutes of that State, it seems that there is dower in a legal remainder. 1 Scribner on Dower (2d ed.), 323, note. And as dower is allowed in Connecticut in equitable estates, there is dower in an equitable estate in remainder. *Green v. Huntington*, 46 Atl. Rep. 883 (Conn.).

<sup>2</sup> Tudor's Lead. Cases (3d ed.), 68.

<sup>3</sup> *Blood v. Blood*, 23 Pick. 84; 1 Scribner on Dower (2d ed.), 63; 1 Wash. R. P. 173; *Frain v. Burgett*, 50 N. E. Rep. 875 (Ind.).

entitled to the actual seisin; so that should the grantor die, having married after he conveyed to A for life and die before A, the widow of the grantor has no dower. To speak of the reversioner in fee simple and of the remainderman in fee simple in such cases as seised in law is to use an expression to be found in the books;<sup>1</sup> but the better view is that the true seisin in law in these cases arises upon the expiration of the particular estate, for at that time the reversioner or remainderman becomes entitled to enter and acquire the actual seisin.<sup>2</sup>

A very excellent illustration of seisin in law arises in the case at the common law of the descent of the fee simple in possession. The owner of an estate in fee simple in possession dies, his heir is immediately entitled to enter and to take possession of the land. This heir has a true seisin in law before entering. After entering he has the actual seisin. Suppose the heir to die without having availed himself of his right of entry, and to leave a widow, she is entitled to dower, because her husband was seised at some time during the marriage, and although it was but a seisin in law, yet it was coupled with the right to have the actual seisin immediately.<sup>3</sup> This is an old common-law rule, and furnishes a good illustration of these old common-law principles. The necessity of an actual entry by the heir to give him the actual seisin is obviated if there be a tenant for years in possession of the land.<sup>4</sup>

At the common law, land in fee simple descends to the heir of the person last actually seised; so that in the above case of the death of the heir without an entry, assuming that there was no tenant for years in possession, the land would descend not to the heir of the deceased heir, but it would descend to

<sup>1</sup> Williams on Seisin, 68, citing Watkins on Descents, 27.

<sup>2</sup> Watkins on Descents, 28-30.

<sup>3</sup> *Vanderheyden v. Crandell*, 2 Denio, 21 (s. c. 1 N. Y. 491); *Tudor's Lead. Cases* (3d ed.), 73; 1 Wash. R. P. 34, 173; 2 Wash. R. P. 485.

<sup>4</sup> *Tudor's Lead. Cases* (3d ed.), 730.



the heir of the ancestor last actually seised. In order for the heir to make himself a new stock of descent in the case of an estate in fee simple, he must be actually seised at the time of his death.<sup>1</sup> Under the modern law, land does not descend to the heir of the person last actually seised ; but it is necessary to bring out these features of the common law that we may comprehend the law as a whole.

Suppose, however, that there be a particular estate and a reversion or remainder, and that this particular estate be a mere term of years. Very strictly taken, a term of years is not an estate, but it is common usage to speak of an estate for years. If in the above cases of the reversion and remainder we substitute for the life estate a term of years in A, we find that the widow of the reversioner or remainderman is entitled to dower, because the reversioner or remainderman has the actual seisin.<sup>2</sup>

As to incorporeal hereditaments the general statement is that there can be no actual seisin of these unless they be appendant or appurtenant to some corporeal hereditament, and that if they be thus appendant or appurtenant there may be an actual seisin of them.<sup>3</sup> But certain incorporeal hereditaments have always been treated as capable in and of themselves of what is equivalent to actual seisin. Rents are an excellent illustration of these, as will be seen by a perusal of the note at the end of Chapter III. Take the case of an easement. Suppose a man to be actually seised of a mill, and that as appurtenant to the mill there be a right to flow his neighbor's land up stream, which gives him a head of water to run his mill. This is an easement of flowage. Now his widow has dower in the whole property, because he is actually seised of both the corporeal hereditament, that is, the mill, and of the incorporeal hereditament, that is, the easement. Indeed,

<sup>1</sup> 2 Black. Com. 209.

<sup>2</sup> 1 Wash. R. P. 154 ; 1 Scribner on Dower (2d ed.), 230.

<sup>3</sup> Williams on Seisin, 53, 58.

the mill might be useless as a mill without the head of water which is given by the flowage.

As to disseisin, the subject is a large one, but put very briefly, to deprive one wrongfully of his seisin is a disseisin.<sup>1</sup> The one who does the act is the disseisor, and the party deprived of his seisin is the disseisee. Suppose, then, that a husband be disseised, and adverse possession be held against him for so long a time as to defeat his right to enter and get back his possession; in other words, suppose him to be barred by the statute of limitations, which generally in this country has a period of twenty years, yet if he were seised at any time during the marriage, no length of adverse possession as against him can deprive his widow of her dower.<sup>2</sup> This is a very important practical principle. Suppose, however, that he was disseised before he married, and did not thereafter enter to regain his seisin, there is no dower, because he was not seised at any time during the marriage.<sup>3</sup> Dower is technical and turns upon seisin, and a disseisee has no seisin. He has not even seisin in law. He has a right of entry, which is less than a seisin of any kind; and this right of entry may at the common law dwindle away into a lower class of rights and become a mere right of action. The proposition that dower turns upon seisin appears still more strongly when we consider that the disseisor, although wrongfully in possession of the land, yet having the seisin, has an estate in which his wife has dower. But her right to dower is, of course, not higher than the estate of her husband from which it is derived, so that it is not good against the disseisee who enters, nor yet his widow if there was seisin at some time during coverture.<sup>4</sup>

As to dower in the case of the widow of an ancestor and the widow of the heir, the junior widow has no dower in the reversion of the senior widow's dower estate, whether the

<sup>1</sup> 1 Wash. R. P. 39; 2 Wash. R. P. 483 *et seq.*

<sup>2</sup> *Blood v. Blood*, 23 Pick. 84; 4 Kent's Com. 37; 1 Wash. R. P. 172, 250.

<sup>3</sup> 1 Wash. R. P. 173.

<sup>4</sup> 1 Wash. R. P. 174, 175.

assignment to the senior widow of her dower be made before or after the death of the heir. But if the junior widow has actually had her dower assigned to her before the assignment was made to the senior widow, the junior widow will be entitled to dower in the reversion of the senior widow's dower estate.<sup>1</sup>

But in case a man has conveyed his land, and his wife has not released her dower right, then upon the death of both grantor and grantee the subordinate dower right, that is, the dower right of the widow of the grantee, does exist in the reversion of the superior dower estate, provided that the assignment of dower to the widow of the grantor was not prior to the marriage of the grantee.<sup>2</sup>

No dower attaches on a joint seisin. The possibility of the estate of the husband being defeated by survivorship precludes dower. But the widow of the survivor may have dower. The widow, however, of a tenant in common is entitled to dower.<sup>3</sup>

The general rule in the United States is that there is dower in wild lands.<sup>4</sup> A rule in Massachusetts established by the courts, and afterwards declared by statute, is that there is no dower in wild lands except in the case of a wood-lot used in connection with the husband's farm or dwelling-house. This exception is statutory. The reason for the rule in Massachusetts excluding dower in wild lands is that it is not thought best to allow the widow to cut timber and thereby depreciate the value of the inheritance.<sup>5</sup>

At the common law one of the methods of barring dower by the wife is by the levying of a fine, that is to say, a con-

<sup>1</sup> 1 Scribner on Dower (2d ed.), 326, 327.

<sup>2</sup> Tied. R. P. § 145; 1 Wash. R. P. 210 and note.

<sup>3</sup> 4 Kent's Com. 37; 1 Wash. R. P. 157, 158.

<sup>4</sup> 1 Shars. & Budd, 304.

<sup>5</sup> 1 Wash. R. P. 110; 1 Shars. & Budd, 304, 305. In Massachusetts it is held that a widow who does not live upon her dower estate has no right to cut the wood upon the premises for sale. *Noyes v. Stone*, 163 Mass. 490.

veyance by fine in the nature of a release. But the ordinary method is by a deed of release. Under the Massachusetts statutes a married woman may join with her husband in his deed of the land to the extent that she releases her dower right to the grantee; and this joining the husband is a matter of every-day occurrence. Nobody will buy a piece of land unless the grantor's wife will release her dower. Under the Massachusetts statutes she may do this by a separate deed of release. And it is held in Massachusetts, that the only way in which she can deprive herself of her dower right is by a deed of release; and to make a deed of release effective it must be to somebody who has some interest in the land.<sup>1</sup> There must be, that is to say, somebody to release to, and there is somebody to release to when she releases to her husband's grantee, either by joining in the deed or afterwards delivering a deed of release.

Dower has been dispensed with in many of the states of this country,<sup>2</sup> and the subject of dower has undergone great modifications in Massachusetts under the Revised Laws of that State.<sup>3</sup>

<sup>1</sup> *Mason v. Mason*, 140 Mass. 63. The general rule is (but not universal), that, if a husband mortgages his land during coverture, and the wife has released her dower and the mortgage is foreclosed by sale, either in his lifetime, or after his death, she being entitled to dower in the proceeds of the sale in jurisdictions where inchoate dower is protected, yet is entitled only in the surplus proceeds of the sale, and that the entire proceeds should not be taken as a basis for computing the amount of the dower interest. The same rule is declared if he mortgaged before coverture. 10 Am. & Eng. Ency. of Law (2d ed.), 169; *Virgin v. Virgin*, 59 N. E. Rep. 587 (Ill.).

<sup>2</sup> *Jones' Forms in Conveyancing* (3d ed.), 61; 2 *Dembitz on Land Titles*, § 108.

<sup>3</sup> Mass. Rev. Laws, ch. 132.

## CHAPTER VII.

## CURTESY.

AN estate by the curtesy is the estate which a husband has in the estates of inheritance of his wife of which she is seised at some time during the coverture, provided that there be issue of the marriage born alive capable of inheriting the estate of inheritance. It is a life estate in the husband for his own life, and is not limited, as dower is, to a third part of the land, but is in the whole of the land.<sup>1</sup> At common law a husband has the entire control of his wife's land, and is entitled to all the rents and profits of the same without accounting to her for them.<sup>2</sup> He is, in legal language, said to be seised in her right; but until issue born he has no curtesy, and the books express it thus, that he has a possibility of curtesy. But upon issue born he has a life estate in the land which is called curtesy initiate, and upon the death of the wife in such case, if he survive her he has curtesy consummate.<sup>3</sup> Now, although some writers may lead one to suppose that he has not curtesy until the death of the wife, yet by the true view he has curtesy upon issue born, and curtesy consummate is not a new estate, but is an extension of curtesy initiate; it is all one estate for his life.<sup>4</sup> The importance of the estate of curtesy initiate is indicated under the common law of New Hampshire more than it is under the common law of Massachusetts. Under the common law of New Hampshire it has been held that if the

<sup>1</sup> 1 Wash. R. P. 127, 128.

<sup>2</sup> 2 Kent's Com. 130 *et seq.*; *Pray v. Stebbins*, 141 Mass. 223, 224.

<sup>3</sup> *Comer v. Chamberlain*, 6 Allen, 170.

<sup>4</sup> Professor Hammond in the *Green Bag* for June, 1890, p. 260.

husband be tenant by the curtesy initiate, and he and the wife be disseised, the statute of limitations does not begin to run against the wife until the death of the husband if she survive him, and that it does not begin to run against the heir of the wife until the death of the husband, provided that the husband survives the wife.<sup>1</sup> But in Massachusetts it is held when there has been a disseisin of the husband and wife, and the husband was tenant by the curtesy initiate, that the statute of limitations begins to run against the wife from the time of the disseisin.<sup>2</sup>

In respect to the common-law right of a husband, the married women's acts, now universal throughout this country and in England, have given a married woman a complete emancipation in respect to her property rights, so that now-a-days under the statutes a husband during his wife's lifetime has no authority over her land, and no right to the rents and profits thereof. It has been recently held in Massachusetts that under the married women's acts, curtesy initiate is like inchoate dower. It cannot be levied on by execution, nor can it be conveyed as a separate estate.<sup>3</sup>

An illustration of the part of the above definition, that the issue must be capable of inheriting the estate, is the case of a limitation to a woman and the heirs male of her body; this is called an estate tail male. Suppose the issue of the marriage to be a female child, there is no curtesy because the female cannot inherit the estate.<sup>4</sup> It was held not long ago in England,<sup>5</sup> and very recently in the New Jersey Chancery,<sup>6</sup> that if

<sup>1</sup> *Foster v. Marshall*, 22 N. H. 491, 494. See further, Litt. § 403; Co. Litt. 246 a; 1 Wash. R. P. 141; *Jackson v. Johnson*, 5 Cow. 74; *Heath v. White*, 5 Conn. 228; 2 Dembitz on Land Titles, pp. 1354, 1355; *Dawson v. Edwards*, 59 N. E. Rep. 590 (Ill.).

<sup>2</sup> *Melvin v. Proprietors*, 16 Pick. 161; *Kittridge v. Proprietors*, 17 Pick. 246, 247.

<sup>3</sup> *Doyle v. Am. Co.*, 181 Mass. 139.

<sup>4</sup> 1 Wash. R. P. 140.

<sup>5</sup> *Barker v. Barker*, 2 Sim. 249 (cited in 1 Wash. R. P. 140, 5th ed.).

<sup>6</sup> *Exton v. Hutchinson*, 32 Atl. Rep. 682 (N. J. Ch.).

there be a devise of real estate to A and her heirs, and, if she die leaving issue, to the issue and their heirs, the husband of A cannot have curtesy, because, though she is given a fee, yet the issue of the marriage cannot possibly inherit from her, as they take in fee simple as purchasers under the will. And this is an excellent illustration of the principle pointed out in an earlier chapter of the distinction between taking by descent and taking by purchase.

It is not material at what time the issue be born, nor how long it may live. Suppose the wife to get her real estate by inheritance, and that, before she inherits, issue of the marriage be born and die, yet there is curtesy.<sup>1</sup> And if she be seised at some time during the marriage and then be disseised, and no issue be born until after the disseisin, yet there is curtesy.<sup>2</sup>

We have already seen that seisin is an essential of the dower estate, but that seisin in law is enough, assuming it, as before shown, to be coupled with the right to have immediately the actual seisin; but to give curtesy, the rule is at the common law that the wife must have the actual seisin,<sup>3</sup> and notwithstanding her common-law disabilities, she is competent to make the entry upon the land, and of course her husband is competent to do so on their joint behalf.<sup>4</sup> This rule of the common law, however, has little force to-day either in England or in this country.<sup>5</sup>

<sup>1</sup> Co. Litt. 29 b; Perkins' Profitable Book, § 473; 1 Shars. & Budd, 244, 261, 262.

<sup>2</sup> Co. Litt. 30 a; *Comer v. Chamberlain*, 6 Allen, 169.

<sup>3</sup> 2 Black. Com. 127. Curtesy exists in England and in this country in equitable estates without the aid of statutory law. 1 Wash. R. P. 160-162; *Reed v. Whitney*, 7 Gray, 536. While a provision in an instrument creating an estate of inheritance, that curtesy shall not attach, is void if the estate of inheritance be a legal estate, such a provision is good if the estate of inheritance thus created be an equitable estate. 1 Shars. & Budd, 268-275.

<sup>4</sup> *The King v. Great Farrington*, 6 Term Rep. 679; Co. Litt. 29 a; *Melvin v. Proprietors*, 16 Pick. 167; 2 Kent's Com. 133; Bacon's Abr., Baron and Feme, I; Perkins' Profitable Book, § 458.

<sup>5</sup> 4 Kent's Com. 30 and note. It is argued by an eminent English

No curtesy attaches on a joint seisin. The possibility of the estate of the wife being defeated by survivorship precludes curtesy. But the husband of the survivor may have curtesy. There is, however, curtesy in tenancies in common.<sup>1</sup>

In this country, there is curtesy in wild or uncultivated lands, without the necessity of an actual entry thereon, with the single exception of Kentucky,<sup>2</sup> and there is a late statute of Kentucky which obviates the trouble there.<sup>3</sup> The theory in Kentucky was that there must be an entry made upon the wild lands to give curtesy. It is not always very safe to say that this or that is the law in the United States, because we have forty-five different systems of law; but we believe that in this country there is an actual seisin of land, and adequate to give curtesy in any case without making an entry, provided that the land be not held adversely by somebody.

Curtesy has been abolished in quite a number of the states,<sup>4</sup> and the subject of curtesy has undergone great modifications in Massachusetts under the Revised Laws of that State.<sup>5</sup>

Before we close this chapter upon curtesy, we wish to give some explanation of the right to dower and curtesy under the following conditions. It has been our effort in this book to lead the reader along from step to step and to avoid the discussion of matters which are to be considered later, when the reader's mind will have become prepared by what will have been communicated. In order, however, to present the matter which we wish now to offer, it is necessary to say that an estate tail is an estate limited to a person and the heirs of his body. As it is limited to a certain class of heirs, it is an estate

writer in a late number of the *Law Quarterly Review* that in England even to-day if the wife get the land by a conveyance there can be no curtesy, unless there be an actual entry made upon the land. 12 *Law Quart. Rev.* 244-246.

<sup>1</sup> 1 Wash. R. P. 135, 413, 417.

<sup>2</sup> 4 Kent's Com. 30; 1 Wash. R. P. 136.

<sup>3</sup> The Laws of Kentucky of 1894, ch. 76.

<sup>4</sup> Jones' Forms in Conveyancing (3d ed.), 61.

<sup>5</sup> Mass. Rev. Laws, ch. 132 and ch. 153.



of inheritance, and is therefore an estate to which dower attaches and to which curtesy attaches as they respectively do to other estates of inheritance. Now, if an estate tail determine by the death of the tenant in tail and the extinction of issue, there is curtesy in the one case and there is dower in the other case just as much as though the estate tail persisted by its possession being continued to the issue after the death of the first taker. In other words, the reversion cannot take effect in possession, in the case of curtesy, until the estate by the curtesy has ceased; and the reversion cannot take effect in possession as to the entire land, in the case of dower, until the estate of dower after having been assigned, has ceased. The same principles apply to the taking effect of a remainder expectant upon the estate tail; for it is immaterial whether there be a reversion over or a remainder over.<sup>1</sup>

Suppose, however, that there be some special or collateral limitation annexed to the estate tail, so that upon the occurrence of some contingent event the estate tail *ipso facto* ceases, and suppose that the estate tail is brought to an end by the happening of the contingent event, it is the rule of the common law that the right to dower and to curtesy, as the case may be, is defeated.<sup>2</sup> The right is defeated as effectually as though the estates of inheritance were limited upon some condition subsequent, of which there had been a breach followed by an entry upon the land to enforce a forfeiture.<sup>3</sup>

We have taken for an illustration of the principle of the common law the case of an estate tail limited upon special or collateral limitation; but the same principle applies to dower and curtesy in a fee, which fee is limited upon special or collateral limitation.<sup>4</sup>

Let us illustrate, taking the case of an estate tail. Sup-

<sup>1</sup> Tudor's Lead. Cases (3d ed.), 61, 70; 4 Kent's Com. 49, 50.

<sup>2</sup> 4 Kent's Com. 49, 50; 1 Wash. R. P. 134, 135.

<sup>3</sup> 4 Kent's Com. 33.

<sup>4</sup> 4 Kent's Com. 49, 50.

pose there be a limitation to A and the heirs of his body so long as Bunker Hill Monument shall stand. Suppose that while the estate tail still continues to exist, Bunker Hill Monument falls. The occurrence of this contingent event causes the estate tail to cease; and with the expiration of the estate tail the dower right is defeated. The same principle applies to curtesy, substituting curtesy for dower.

It is perceived that we have above been considering limitations which are good at the common law; but there are limitations which are not good at the common law, but are good under the Statute of Uses or the Statute of Wills. Such a limitation is found in the leading case of *Buckworth v. Thirkell*,<sup>1</sup> which was as follows: This was a devise to trustees and their heirs for the benefit of A till she shall attain twenty-one years of age or marry; and on either event to her use in fee; but in case she shall die before that age, and without leaving issue, then from and after the decease of said A without issue as aforesaid, the estate to go to B. A married, had a child which died, and died herself before attaining the age of twenty-one years. It was held by Lord Mansfield that the husband of A was entitled to curtesy, although the estate went over to B because of the death of A under age, and without leaving issue her surviving.

<sup>1</sup> *Buckworth v. Thirkell*, 3 Bos. & Pull. 652, note, and 10 Moore, 235, note. See further, *House v. Jackson*, 50 N. Y. 161; 3 Univ. Law Rev. 22; *Welch v. Brimmer*, 169 Mass. 214, 215.

## CHAPTER VIII.

## CHATELS REAL AND LANDLORD AND TENANT.

ALL personal property is divided into two classes, which are chattels real and chattels personal. Chattels real are of four classes: (1) Terms of years, (2) tenancies at will, (3) tenancies from year to year, (4) tenancies at sufferance.

We will now consider the subject of terms of years. Anciently terms of years, although chattel interests, were frequently limited to the tenant and his heirs, or to the tenant and to the heirs of his body, but for centuries a lease so expressed has been the equivalent of a lease to a man and his executors or administrators, which is the correct form of a limitation of personal property.<sup>1</sup>

Although a term of years is but a chattel and a contract, yet upon the creation of a term the tenant frequently swore fealty,<sup>2</sup> and though at the common law the rent reserved upon a term of years is rent service, yet, owing to the chattel quality of the term, the relation between the landlord and the tenant is not regarded strictly as tenure, though it is not uncommon to call it tenure.<sup>3</sup> Rent service is tenurial. Notwithstanding that the tenant holds of the landlord, the relation is not regarded, strictly speaking, as tenure. We have explained this element of rent service in Chapter III., above, and in the note at the end of that chapter.

<sup>1</sup> 14 Harv. Law Rev. 401, 402.

<sup>2</sup> Litt. § 132; Co. Litt. 67 b, 93 b.

<sup>3</sup> Williams, R. P. (17th ed.) 305, 306, 467; 2 Wash. R. P. 5; 6 Law Quart. Rev. 69; 5 Law Quart. Rev. 326; 8 Law Quart. Rev. 91; 2 Pollock & Maitland, 112-114, 117, note, 147, note; Challis, R. P. (2d ed.) 55, 56, and Appendix 1.

A lease for years was not created by feoffment and livery of seisin. It was created at the common law by a common-law lease. It could, as much so as could an incorporeal hereditament, already explained, be created to begin *in futuro*.<sup>1</sup> If made to begin *in futuro*, then until the time should arrive, and until the tenant should enter upon the land, the interest of the tenant was called an *interesse termini*; and at the common law, if made to begin immediately, the interest of the tenant until he should enter was but an *interesse termini*. His lease was not perfected until he had entered upon the land,<sup>2</sup> and like as we have seen in respect to the ceremony of feoffment, and in respect of the ceremony of attornment, so the entry by the lessee was quite public and with some ceremony.<sup>3</sup> But it was his entry by which he became entitled; and Blackstone says it would be improper to create a term of years by a feoffment, for that the ceremony of feoffment and livery of seisin is appropriated to the creation of a freehold estate.<sup>4</sup>

We do not agree that the distinction between the method of creation of a freehold estate and the method of creation of a term of years accounts wholly for the fact that while a freehold estate could not be created to begin *in futuro*, a term of years could be created to begin *in futuro*, as if it were enough to say that the freehold estate has to be created at the common law by feoffment and livery of seisin, and that the feoffment must take effect now, immediately, or not at all, while the term of years, being created by a lease, may take effect *in futuro*. Stopping at this point it seems to us that an essential ingredient has been passed over, and that that essential ingredient is the fact that the freehold estate is a feudal institution. It is

<sup>1</sup> 4 Kent's Com. 94, 97; 1 Wash. R. P. 296, 314; Eccl. Comrs. v. Treemer (1893), 1 Ch. 171.

<sup>2</sup> See authorities in note 1, above.

<sup>3</sup> 2 Black. Com. 144, 314.

<sup>4</sup> 2 Black. Com. 314; Litt. § 59; 4 Kent's Com. 94, 95, 97; 1 Wash. R. P. 295.

true that the freehold estate is created by feoffment and livery of seisin at the common law, and that the feoffment must take effect now, immediately, or not at all. But what is this freehold estate thus created? The answer we take to be that it is a certain something which exists under, and has its root in feudalism. We think, then, that the distinction which exists between the ability to create a term of years to begin *in futuro* and the inability to create a freehold estate to begin *in futuro* is a feudal distinction. The freehold is an estate; and we have in a previous chapter shown the feudal character of an estate. The term of years is not an estate;<sup>1</sup> it is but a contract, a chattel interest. The distinction between these two things is to our mind a feudal distinction.

Leases for years could be oral down to the 29th year of Charles II., when the Statute of Frauds made it necessary to put them into writing.<sup>2</sup> But even in early times they were frequently by deed. The deed, however, had no more effect in transferring the title than the charter of feoffment had, as already shown, in transferring the title of a freehold. It was the livery of seisin in the one case, and the entry in the other, which was the effectual act. But a freehold estate was sometimes created by giving a term of years to come in before the possession of the freehold: Thus to A for years, the remainder to B and his heirs; and here, as a freehold was created, the transaction was by a feoffment. A lease followed by an entry would not be enough to create a freehold estate. The livery of seisin would be made to A, who would act as a sort of bailiff to receive the seisin; and then theoretically the seisin would instantaneously pass over to B, who would therefore have the actual seisin of the land, while A, the termor or tenant for years, would have the actual possession of it during the period of his term.<sup>3</sup> This is not a true remainder, but is what

<sup>1</sup> Challis, R. P. (2d ed.) 58; 1 Wash. R. P. 290; 2 Black. Com. 253, 254, 527 (Hammond's ed.).

<sup>2</sup> See the authorities in note 4, page 70, above.

<sup>3</sup> Litt. § 60.

is known as a so-called remainder ; for a true remainder must have a freehold estate for its particular estate to support it.

It has puzzled scholars to discover how livery of seisin could be made at the common law to a mere termor, even though it was for the benefit of the freeholder ; and it has been suggested, and we think very satisfactorily, that this principle of law is to be referred to that early period, as we have in an earlier chapter shown, when seisin meant possession and a termor was regarded as seised, and the feoffment transferred the possession to the termor who held it for the benefit of himself first, and afterwards for the benefit of the so-called remainderman in fee.<sup>1</sup>

We have already spoken of the lease and release as one of the ancient common-law conveyances, and it was this : A lease for years would be made, and the tenant would enter, and he was then in a position to have the freehold estate released to him by a deed of release.<sup>2</sup> This was as effectual a method of conveying land as was even the feoffment itself. It is easy to see that this is not strictly livery of seisin. It was necessary, however, for the tenant to enter and perfect his lease, thereby getting the possession of the land, before a valid title to the freehold could be made to him by a release. And here, again, there has been a puzzle to comprehend how it was that a mere termor could have such an interest in land that the freehold estate could be given him without livery of seisin ; and again, the explanation has been offered, which we think is satisfactory, that this was because of that ancient principle, which for ages has been obsolete, that a mere tenant for years was seised because he had possession, so that there was no apparent objection to enlarging his interest by releasing to him the freehold by deed.<sup>3</sup> After the Statute of Uses (27 Henry VIII.), there

<sup>1</sup> 2 Black. Com. 526, 530 (Hammond's ed.).

<sup>2</sup> Williams, R. P. 180-183 ; 4 Kent's Com. 97 ; 1 Wash. R. P. 296, 314.

<sup>3</sup> 2 Black. Com. 531 (Hammond's ed.).

grew up a conveyance which we call the statute of uses conveyance of lease and release, and in this conveyance the lease part operated under the Statute of Uses, and this conveyance became the common conveyance of land in England, but by no means the exclusive one, down to 1841,<sup>1</sup> when the present statutory conveyance of land became the common conveyance there. The present statutory conveyance in England is a deed of grant,<sup>2</sup> which, as we have seen, is devoted at the common law to the creation and assignment of incorporeal rights.

At this point we will remind the reader of what we explained so fully in Chapter III. in respect to the creation of a freehold estate in land by livery of seisin; and we there said that while it is not accurate to say that the freehold estate or corporeal right must at the common law be created by livery of seisin, referring in that connection to fines, common recoveries, and the lease and release, yet, that as it is the conventional statement of the best writers that the freehold or corporeal right must at the common law be created by livery of seisin, we shall conform to that usage.

Terms of years, as already stated, are mere chattels in the class known as chattels real. They are regarded as mere contracts, and the question is, why they were regarded as such insignificant rights. It has been a common opinion that it was because in early days they were given to an inferior class of tenants, that is to say, to poor men; and Blackstone tells us that they were generally given to mere farmers or husbandmen, and hence their inferiority.<sup>3</sup> But Pollock and Maitland and Professor Hammond have by their researches changed opinion on this point. It appears that Blackstone is mistaken; for that terms of years were in ancient days in England frequently granted to very rich men, and that long terms are to be found very early in the history of English law. A term of one thousand years has never been uncom-

<sup>1</sup> Williams on Seisin, 146.

<sup>2</sup> *Savill v. Bethell* (1902), 2 Ch. 538.

<sup>3</sup> 2 Black. Com. 141.

mon, and is to-day common in England.<sup>1</sup> In this country we are not much accustomed to such long terms, but a term of one hundred years or upward is not very uncommon with us. And a term of ninety-nine years is perhaps to be found with us more frequently than a term of one hundred years.

Now it was a common thing in very early days in England to make an investment of money in land, and take as security a term of years; and the reason why the term of years is a chattel interest and a mere contract is because it was frequently made upon an investment of money, thus giving it the character of personal property rather than of real estate.<sup>2</sup> Now, while at the common law there cannot be a devise of land, there never has been a time when there could not be a bequest of personal property at the common law; that is to say, a man cannot at common law pass his land by his will; but he can pass his personal property by his will. It was not until the reign of Henry VIII. that a statute was passed allowing the legal interests in land to be devised. But terms of years could always be transmitted by will, that is, a man owning a term of years could bequeath it, because it was personal property.<sup>3</sup>

We have a statute in Massachusetts which provides that a term of one hundred years or upwards shall be taken as a fee simple so long as fifty years of it remain to be enjoyed; and a widow has dower in such a term, and a husband has curtesy in such a term, as though it were a freehold estate.<sup>4</sup>

We have a statute in Massachusetts which provides that a term of seven years or upwards must be recorded; that is, the lease must be recorded in the registry of deeds in the county in which the land is situated, in order to bind a purchaser of

<sup>1</sup> 2 Black. Com. 253, 254, 527 (Hammond's ed.); 1 Pollock & Maitland (Introduction), p. xxxv; 1 Pollock & Maitland, 338; 2 Pollock & Maitland, 113, 115, 116, 329.

<sup>2</sup> 2 Pollock & Maitland, 115, 116, 329.

<sup>3</sup> 2 Pollock & Maitland, 113, 115, 116, 329; 1 Pollock & Maitland, 338.

<sup>4</sup> Mass. Rev. Laws, ch. 129.



the land who has not actual notice of the term. A party buying a piece of land which is subject to a term of seven years or upwards takes his land free from the encumbrance of the outstanding term unless he has actual notice of it, or this constructive notice of it which the record in the registry of deeds constitutes. In *Toupin v. Peabody*, there was a term of five years with the right of renewal for another five years, and it was held that this was a term of seven years or upwards within the meaning of this statute.<sup>1</sup>

Independently of statute 32 Hen. VIII. ch. 34, debt lies for rent by the assignee of the reversion against the lessee of a term of years by virtue of the privity of estate.<sup>2</sup> The statute of 32 Hen. VIII. ch. 34, was intended to extend the right to sue in covenant to actions by and against assignees.<sup>3</sup> If the reversion be conveyed by an absolute conveyance, or if it be conveyed by a mortgage deed, the same principle applies, that the right to all subsequently accruing rent passes with the reversion. Of course the lessee is not liable for rent which he has paid the grantor before notice to him of the conveyance of the reversion. But if after a mortgage of the reversion has been made, the mortgagor makes a lease for years, the mortgagee must enter upon the land or do some act, which in law is the equivalent of an entry, in order to entitle himself to the rent which may subsequently accrue.<sup>4</sup> The right of the lessor to recover rent of the assignee of the lessee is not founded on privity of contract, even though there be in the lease a covenant to pay rent, but on privity of estate, and he may sue in his own name.<sup>5</sup> It may be well to point out in this connection that an action for use and occupation does

<sup>1</sup> *Toupin v. Peabody*, 162 Mass. 473. See further, *In re Handee v. Bagley's Contract* (1892), 3 Ch. 49.

<sup>2</sup> *Patten v. Deshon*, 1 Gray, 136; *Grundin v. Carter*, 99 Mass. 16; *McNeil v. Kendall*, 128 Mass. 253; 38 Atl. Rep. 808 (N. J.).

<sup>3</sup> *Patten v. Deshon*, 1 Gray, 326.

<sup>4</sup> *Russell v. Allen*, 2 Allen, 42.

<sup>5</sup> *Grundin v. Carter*, 99 Mass. 15, 16; *Bell v. American Protective League*, 163 Mass. 561.

not depend upon privity of estate, but depends upon contract express or implied.<sup>1</sup>

To render a person liable in an action of covenant for rent as an assignee of the lessee, he must have taken an assignment of the whole or a part of the land for the whole of the unexpired part of the term.<sup>2</sup> The principle is that an assignment by a lessee of the whole or of a part of the land for a part only of the unexpired portion of the term is not an assignment, but is a sub-lease;<sup>3</sup> and in such a case the original lessor has no right of action for the rent stipulated for in the covenant against the sub-lessee.<sup>4</sup> If the whole or a part of the land be transferred by a lessee for the whole of the unexpired part of the term this is an assignment and not a sub-lease, whether the transfer was by an assignment of the original lease or whether there was a new lease made.<sup>5</sup> The test is whether the lessee has parted with his whole interest in the leased premises, or in any definite portion thereof. The grant of an interest, therefore, which may possibly endure to the end of the term is not necessarily a grant of all the estate in the term; in other words, it is not necessarily an assignment.<sup>6</sup>

A lessor may in equity recover of mere sub-lessees the rent which has accrued subsequently to the bankruptcy of the lessee, provided that the assignee in bankruptcy has declined to assume the lease.<sup>7</sup>

The mere assignment by a lessee of his lease does not exonerate the lessee from his liability for rent, nor destroy the privity of estate between the lessor and lessee. But if the lessor assents to the assignment, this privity of estate is

<sup>1</sup> *Rogers v. Coy*, 164 Mass. 391.

<sup>2</sup> *Patten v. Deshon*, 1 Gray, 329.

<sup>3</sup> *Patten v. Deshon*, 1 Gray, 330.

<sup>4</sup> *Patten v. Deshon*, 1 Gray, 330.

<sup>5</sup> *Dunlap v. Bullard*, 131 Mass. 161, 162; *McNeil v. Kendall*, 128 Mass. 245.

<sup>6</sup> *Dunlap v. Bullard*, 131 Mass. 161, 162; *McNeil v. Kendall*, 128 Mass. 245.

<sup>7</sup> *Haley v. Boston Belting Co.*, 140 Mass. 73.

thereby terminated, and the lessor cannot maintain an action of debt for rent against the lessee. Receipt of rent from the assignee is evidence of such assent. But even after assent, and after reception of rent by the lessor from the assignee, the lessee still remains liable for rent upon his covenant to pay rent. The effect of assent, as evidenced by reception of rent or in any other way, simply is to destroy the privity of estate between the lessor and lessee; but the lessee even then still remains liable to the lessor upon his covenants for all rent, whether it accrued prior or at any time subsequent to the assent.<sup>1</sup>

The assignee of a lessee is not liable to the lessor for the rent until the lessee has himself paid it.<sup>2</sup>

As a general proposition the covenants of the lessee run with the land. The chief of these covenants in leases for years are the covenant to pay rent, the covenant to pay taxes, the covenant to make certain repairs, the covenant not to make improper use of the premises, and the covenant not to assign or underlet without consent in writing.<sup>3</sup>

If there be a lease under seal and it be assigned it is not necessary that the assignment should be itself under seal, for the covenants contained in the lease which run with the land will run with the land as effectually as though the assignment were under seal.<sup>4</sup>

If a lessor assign the lease without assigning the reversion, the assignee may maintain an action in his own name to recover the rent which may accrue after the assignment, in an action against the lessee or his assignee. The privity of contract is in such case transferred.<sup>5</sup>

<sup>1</sup> *Wall v. Hinds*, 4 Gray, 256, 266; *Dwight v. Mudge*, 12 Gray, 24, 25; *Patten v. Deshon*, 1 Gray, 330; *Pfaff v. Golden*, 126 Mass. 402; *Whitcomb v. Cummings*, 38 Atl. Rep. 503 (N. H.); *Barnes v. Northern Trust Co.*, 48 N. E. Rep. 31 (Ill.).

<sup>2</sup> *Farrington v. Kimball*, 126 Mass. 313.

<sup>3</sup> *Crocker's Notes on Common Forms* (3d ed.), 232, 237-239.

<sup>4</sup> *Sanders v. Partridge*, 108 Mass. 556.

<sup>5</sup> *Hunt v. Thompson*, 2 Allen, 341; *Beal v. Boston Car Co.*, 125 Mass. 159.

If a lease be under seal and be assigned by the lessee, the assignee is liable for rent which subsequently accrues, even though he has not entered.<sup>1</sup> It is said by way of *dictum* in *Sanders v. Partridge*,<sup>2</sup> that the assignee of the lessee is not liable for rent which subsequently accrues until he has made an entry, provided that the lease be not under seal.

In a lease the words "demise" and "lease" imply a covenant of title by the lessor which involves a covenant for quiet enjoyment if the lease be under seal, and a contract for quiet enjoyment if the lease be not under seal.<sup>3</sup> The word "demise" or its equivalent must be used.<sup>4</sup> A structural injury to a house caused by the lessor or by the assignee of the reversion (for the covenant runs with the land, and binds the assignee of the reversion) is said in a recent English case to be a breach of the covenant for quiet enjoyment.<sup>5</sup> And the erection by the lessor on the adjoining land of a building of such height as to cause the chimneys of the leased house to smoke is a breach of the covenant for quiet enjoyment.<sup>6</sup>

If an executor or administrator of a lessee enter and take possession of the demised premises, he makes himself personally liable for the rent which thereafter accrues.<sup>7</sup> The liability of the executor or administrator in such a case is measured by the rental value of the premises, and the amount of rent stipulated for in the lease is *prima facie* evidence of this rental value.<sup>8</sup>

There is no obligation devolved upon a lessor to make re-

<sup>1</sup> *Sanders v. Partridge*, 108 Mass. 560.

<sup>2</sup> *Sanders v. Partridge*, 108 Mass. 560; but to this latter point see 2 Kerr, R. P. § 1240 and note.

<sup>3</sup> Crocker's Notes on Common Forms (3d ed.), 234, 239, 240.

<sup>4</sup> *Baynes v. Lloyd* (1895), 2 Q. B. 610; *Mershon v. Williams*, 44 Atl. Rep. 211 (N. J.).

<sup>5</sup> *Manchester, etc. R. R. Co. v. Anderson* (1898), 2 Ch. 394.

<sup>6</sup> *Tebb v. Cave* (1900), 1 Ch. 642.

<sup>7</sup> *Inches v. Dickinson*, 2 Allen, 71; *Hoyt v. Stoddard*, 2 Allen, 442; *Wales v. Chase*, 139 Mass. 538; *Abbott v. Stearns*, 139 Mass. 168; *Bell v. American Protective League*, 163 Mass. 558.

<sup>8</sup> *Inches v. Dickinson*, 2 Allen, 71. See *In re Bowes*, 37 Ch. Div. 128.

pairs in the case of a lease for years unless an obligation be created by some covenant contained in the lease.<sup>1</sup> In the absence of a covenant contained in a lease for years, there is no obligation devolved upon the lessee to make repairs except that he must keep the house wind and water tight and restore such things as windows and doors which have been broken by him during his tenancy.<sup>2</sup> But a tenant for years is liable for waste whether the waste be voluntary or whether it be involuntary or permissive.<sup>3</sup> An injury to or destruction of the premises arising from the negligence of the tenant in the care of a stove upon the premises is permissive waste.<sup>4</sup> A tenant at will is not liable for permissive waste.<sup>5</sup>

We have just seen what are the duties which devolve upon a tenant for years in respect to the condition of the premises as to his landlord. We next turn to the obligation to keep the premises in a safe condition toward the public and persons visiting the premises ; and, as a general proposition, it may be stated as the rule that this duty is devolved upon the tenant alone unless the landlord has bound himself by an agreement with the tenant to keep the premises in a safe condition. In this latter case a member of the public or a person visiting the premises who has been injured by a defect in the condition of the premises, in order to avoid circuity of action, may hold the landlord responsible.<sup>6</sup> But a landlord is liable for an injury suffered by a member of the public or by a person visiting the premises, from some defect in the con-

<sup>1</sup> *Leavitt v. Fletcher*, 10 Allen, 121; *McLean v. Fiske Wharf & Warehouse Co.*, 158 Mass. 474.

<sup>2</sup> *Crocker's Notes on Common Forms* (3d ed.), 247, 248; *Taylor's Landlord & Tenant*, § 343.

<sup>3</sup> *Lothrop v. Thayer*, 138 Mass. 474; *Davies v. Davies*, 38 Ch. Div. 504. But see *In re Cartwright*, 41 Ch. Div. 532.

<sup>4</sup> *Lothrop v. Thayer*, 138 Mass. 466.

<sup>5</sup> *Lothrop v. Thayer*, 138 Mass. 466.

<sup>6</sup> *Lowell v. Spaulding*, 4 Cush. 278; *Mellen v. Morrel*, 126 Mass. 545; *Com. v. Watson*, 97 Mass. 564; *Munroe v. Carlisle*, 176 Mass. 199; *McLean v. Fiske Wharf & Warehouse Co.*, 158 Mass. 474.

dition of the premises, provided that the tenant for years had no control of that portion of the premises in which the defect existed.<sup>1</sup> An injury suffered by a member of the public from the fall of ice from the roof of a building, which building came to the edge of the sidewalk, and the roof was so constructed that ice would readily fall therefrom, imposes a liability upon the landlord, inasmuch as the tenant for years had not possession of the roof.<sup>2</sup> A distinction is made in some cases between an injury suffered by a visitor of the tenant upon the premises, and an injury suffered by a member of the public while he is passing by the premises, from a structural defect which existed when the premises were let to the tenant; and that while the landlord, assuming he has entered into no contract with the tenant to assume liability for the care of the premises, is not liable in the first case, he is liable in the latter case.<sup>3</sup> If the tenant, or a person occupying by his permission or as a member of his family, is injured by some defective condition of the premises, and the house be let as an unfurnished house, the landlord is not liable.<sup>4</sup> And a landlord who knows of the defective condition of a drain, provided that the defect was an ordinary defect and the danger was the ordinary danger from that source, is not liable in damages to his tenant for the sickness of the tenant arising therefrom, and is not bound to disclose the fact to the tenant.<sup>5</sup>

A term of years may be for one year or for more than one

<sup>1</sup> *Cunningham v. Camb. Sav. Bk.*, 138 Mass. 481; *Watkins v. Godell*, 138 Mass. 536; *Learoyd v. Godfrey*, 138 Mass. 315; *Larue v. Farren Hotel Co.*, 116 Mass. 67; *Leonard v. Storer*, 115 Mass. 86; *Wilcox v. Zane*, 167 Mass. 302; *Brintnall v. Leydecker*, 158 Mass. 292; *Lynch v. Swan*, 167 Mass. 510.

<sup>2</sup> *Shipley v. Fifty Associates*, 106 Mass. 194; *Leonard v. Storer*, 115 Mass. 86.

<sup>3</sup> *Lane v. Cox* (1897), 1 Q. B. 415; *Sanford v. Clarke*, 21 Q. B. Div. 398.

<sup>4</sup> *Bowe v. Hunking*, 135 Mass. 380; *Woods v. Naumkeag Co.*, 134 Mass. 357.

<sup>5</sup> *Bertie v. Flagg*, 161 Mass. 504.

year, or for any period less than one year. The essential fact is that it must be for some definite fixed time, or, under the maxim of law that that is certain which can be made certain, for some time capable of being rendered certain under an agreement between the parties.<sup>1</sup> The result is that even a written lease does not create a term of years if the period of its duration is indeterminate, but it creates a mere tenancy at will.<sup>2</sup> A tenancy at will is terminated by a conveyance by the landlord of his reversion, also by a lease by the landlord for a term of years, also by an assignment by the tenant at will of his interest in the premises, or by his making a lease of the premises. Either of these acts converts the tenancy at will into a tenancy at sufferance.<sup>3</sup> But if a tenant at will make a lease of the premises this creates a good tenancy as between himself and his lessee.<sup>4</sup> There are also statutory methods for the determination of tenancies at will by written notice to quit, independently of cases of non-payment of rent, as well as in such cases. If a tenancy at will exist, and this is converted into a tenancy at sufferance by a conveyance of the land by the landlord, and the deed be recorded, but no notice is given the tenant of the fact of the conveyance, the grantee cannot recover rent of the tenant, and the record in the Registry of Deeds is not notice because the title of the tenant is antecedent to the recording of the deed.<sup>5</sup>

An oral contract by a boarding-house keeper to board a man

<sup>1</sup> 2 Black. Com. 143; 4 Kent's Com. 86.

<sup>2</sup> *Murray v. Cherrington*, 99 Mass. 229. Sometimes persons who have contracted to buy the land, and sometimes persons who have contracted to take a written lease of the land for a term of years are let into the possession immediately. It is impossible to formulate any statement which will be true as applicable to all such cases. The question is whether the party taking the possession is a mere licensee or is a tenant at will. An interesting and learned discussion of this subject will be found in *Lyon v. Cunningham*, 136 Mass. 532.

<sup>3</sup> *Hooton v. Holt*, 139 Mass. 54; *Holbrook v. Young*, 108 Mass. 83; *Curtis v. Galvin*, 1 Allen, 215; *Hammond v. Thompson*, 168 Mass. 531.

<sup>4</sup> *Holbrook v. Young*, 108 Mass. 83.

<sup>5</sup> *Dixon v. Smith*, 181 Mass. 218.

for a stipulated time, and provide him a room in the house, is not a tenancy at will, but is a valid contract for the whole time. The relation of landlord and tenant does not exist.<sup>1</sup>

Rent is not apportionable unless, as is frequently the case in modern times, it is made so by statute. If, then, there be a lease for years and a stipulation therein that the lessor may terminate the tenancy before the expiration of the lease, and the lessor terminate the tenancy at some time between the rent days, no action can be maintained for compensation for the use of the premises since the preceding rent day. No action will lie on the covenant to pay rent, because the rent is not apportionable, and an action for use and occupation will not lie upon an implied contract to pay for the beneficial use of the premises, for when there is an express contract a contract will not be implied. The same principle applies to a tenancy at will which is created with an express agreement that the landlord may terminate the tenancy at any time between the rent days.<sup>2</sup> But if a tenant be evicted from a part of the premises by a title paramount, rent is apportionable, so that he is liable for a fair rent for the part of the premises from which he is not evicted.<sup>3</sup> But if the landlord evict the tenant from a part of the premises this suspends the entire rent, for the rent cannot be apportioned in such case. If the landlord erect a structure which encroaches upon a part of the premises so as materially to interfere with the use of a portion of the rest of the premises, this is such an eviction.<sup>4</sup>

If a landlord have a right to expel the tenant from the premises, and if he use force to accomplish this and the tenant

<sup>1</sup> *White v. Maynard*, 111 Mass. 250.

<sup>2</sup> *Nicholson v. Munigle*, 6 Allen, 129 and note, 215; *Smiley v. McLauthlin*, 138 Mass. 363; *Van Deusen v. Blum*, 18 Pick. 230; *Leishman v. White*, 1 Allen, 489.

<sup>3</sup> *Fillibrown v. Hoar*, 124 Mass. 583; *Smith v. McEnany*, 170 Mass. 26.

<sup>4</sup> *Royce v. Guggenheim*, 106 Mass. 201; *Smith v. McEnany*, 170 Mass. 26; *Leishman v. White*, 1 Allen, 489; *Shumway v. Collins*, 6 Gray, 227.



resist him, he has a right to use whatever force may be necessary to expel the tenant; so that the tenant cannot maintain an action of tort against the landlord unless the landlord has used more force than was necessary.<sup>1</sup> But the landlord, from the standpoint of the criminal law, has no right to use force, and if he be indicted, it is no defence that he used only such force as was necessary to expel the tenant.<sup>2</sup>

Some of the methods common for the determination of tenancies for non-payment of rent are in the different states statutory, but the common-law method of making an entry upon the land and demanding the rent would seem still to subsist. The requirements in this case are technical. The landlord must enter upon the premises on a rent day and, at some notorious place thereon, make a demand for the rent, and this must be done at a convenient time before sunset.<sup>3</sup> In order for a landlord to avail himself of the common-law method of terminating a tenancy under a lease for years for non-payment of rent, there must be a clause of forfeiture contained in the lease.<sup>4</sup>

One who lets an unfurnished building to be occupied as a dwelling-house does not impliedly agree that it is fit for habitation.<sup>5</sup> But one who lets a furnished building to be occupied as a dwelling-house for a few months does impliedly agree that it is fit for habitation.<sup>6</sup>

<sup>1</sup> *Low v. Elwell*, 121 Mass. 309; *Meador v. Stone*, 7 Met. 151.

<sup>2</sup> *Com. v. Haley*, 4 Allen, 318; *Page v. Dwight*, 170 Mass. 29.

<sup>3</sup> *Chapman v. Harney*, 100 Mass. 354; *Hartwell v. Kelley*, 117 Mass. 237; *Rogers v. Snow*, 118 Mass. 123.

<sup>4</sup> *Taylor's Landlord & Tenant*, §§ 290, 700; *Smythe's Landlord & Tenant*, 821; *Hodgkins v. Price*, 137 Mass. 17.

<sup>5</sup> *Ingalls v. Hobbs*, 156 Mass. 349; *McKeon v. Cutter*, 156 Mass. 296; *Royce v. Guggenheim*, 106 Mass. 202.

<sup>6</sup> *Ingalls v. Hobbs*, 156 Mass. 348. See further, 9 Harv. Law. Rev. 289. But in the letting of a furnished house there is no implied agreement that it is suitable for the purposes of the lessee's occupation. *Davis v. George*, 39 Atl. Rep. 979 (N. H.). In the letting of a furnished house there is no implied agreement that it shall continue fit for habitation. *Sarson v. Roberts* (1895), 2 Q. B. 395.

If there be a condition contained in the lease and a breach thereof, and the lessor waive the breach, this is a waiver of his right in any subsequent case to enforce the condition.<sup>1</sup> But a mere acquiescence in a breach in a given case is not a waiver by the lessor of his rights as to subsequent breaches.<sup>2</sup>

Only parties and their privies can take advantage of an estoppel.<sup>3</sup>

The general principle is that though the lessee is estopped to deny the title of his landlord, yet if the lessee be evicted or be threatened by eviction by one having a paramount title he may attorn to such person. But the lessee in such case, in order successfully to deny the title of his landlord in an action by the landlord against him, has the burden of proof to show that the title is a title paramount.<sup>4</sup> And a tenant is not estopped to show that since his own entry into possession his landlord's title has expired either by its own limitation, or by the act of the landlord, or by eviction by title paramount.<sup>5</sup> We have above seen that one of the methods of terminating a tenancy at will is that of a conveyance by the owner of the reversion of the fee, or by the creation by the owner of the reversion of a term of years by a written lease. We have also above seen that a tenancy at will is determined among other ways by an assignment by the tenant at will, or by his making

<sup>1</sup> *Dumpr's Case*, 4 Rep. 119; *Crocker's Notes on Common Forms* (3d ed.), 86, 249. In *Kew v. Trainor*, it was held under a lease containing a provision for not assigning without consent, that a consent as to a specific person, expressly preserving the right to require consent, was not a waiver of the right to enforce the condition in case of the subsequent assignment to another person. *Kew v. Trainor*, 37 N. E. Rep. 223 (Ill.).

<sup>2</sup> 1 Wash. R. P. 317, 323.

<sup>3</sup> *Braintree v. Hingham*, 17 Mass. 432; *Worcester v. Green*, 2 Pick. 425; *Buffum v. Hutchinson*, 1 Allen, 58; *Richardson v. Cambridge*, 2 Allen, 118. See *Tufts v. Charlestown*, 2 Gray, 271.

<sup>4</sup> *Morse v. Goddard*, 13 Met. 177; *Knowles v. Maynard*, 13 Met. 352; *George v. Putney*, 4 Cush. 354; 2 Wash. R. P. 463, 464; 1 Wash. R. P. 356, 357, 361; Co. Litt. 47 b; Bac. Abr., Leases, O; *Blake v. Sanderson*, 1 Gray, 332; *Towne v. Butterfield*, 97 Mass. 105.

<sup>5</sup> *Hilbourn v. Fogg*, 99 Mass. 12; *Grundin v. Carter*, 99 Mass. 16; *Lamson v. Clarkson*, 113 Mass. 349; *Chamberlain v. Perry*, 138 Mass. 546.

a lease of the premises. We have also above seen that a lease made by a tenant at will is good as between the parties. But if a tenant at will make the defendant his tenant at will, and the first-mentioned tenant make a written lease to the plaintiff, and the latter claim that this lease has put an end to the interest of the defendant, the defendant is not estopped to show that his landlord had not the requisite title to confer upon the plaintiff an interest which could determine the rights of the defendant in the land; and as a mere tenant at will he had not the requisite title to accomplish this end.<sup>1</sup>

Upon a lease for years with a covenant for rent, the rent is payable to the end of the term, although the premises be burned. But it is otherwise in the case of a lease of rooms in a building.<sup>2</sup>

<sup>1</sup> *Palmer v. Bowker*, 106 Mass. 317.

<sup>2</sup> *Stockwell v. Hunter*, 11 Met. 448, 457, 458.

## CHAPTER IX.

THE REVERSION, POSSIBILITY OF REVERTER, AND  
REMAINDER.

A REVERSION is an estate not capable of being immediately enjoyed. It is, therefore, an estate of future enjoyment. But it is a vested estate.<sup>1</sup> This element that it is a vested estate is a very important thing to be remembered. If there be an outstanding estate of dower in possession of the widow, or if there be an outstanding estate of curtesy consummate, the heir of the deceased husband or wife, as the case may be, has a reversion which is subject to the outstanding particular estate for life, and if there be a limitation to A for life or for years the grantor has left in him the reversion.

The distinction between a reversion and a possibility of reverter is this: If the outstanding estate must certainly at some time determine, there is a reversion. If it be uncertain whether it will determine or not, there is a possibility of reverter. Therefore, if the outstanding estate be a fee of the sort which may terminate upon limitation, there is a possibility of reverter, subject to an exception presently to be mentioned. A limitation to A and his heirs until B returns from Rome is a determinable fee, as already shown. This leaves a possibility of reverter, because it is uncertain whether the fee will determine or not.<sup>2</sup> Now take the case of a limitation to A and his heirs so long as a certain tree shall stand, or so long as Bunker Hill Monument shall stand. Here is a determinable fee being limited to A and his heirs which may en-

<sup>1</sup> *Steel v. Cook*, 1 Met. 281, 283.

<sup>2</sup> 1 Wash. R. P. 63, 64; 2 Wash. R. P. 390; Tied. R. P. §§ 385, 398.

endure longer than the lifetime of a living person. Although there are *dicta* in the books that here there is a possibility of reverter,<sup>1</sup> the better opinion is that the reversionary right is a reversion, because the fee must necessarily come to an end at some time or other. The tree or the monument must perish in time.<sup>2</sup> Such illustrations are peculiar, and ordinarily if a fee be created and there be any reversionary right, that right is a possibility of reverter. Ordinarily what can be predicated of a reversion, which as above stated is a vested estate, can be predicated of a vested remainder; but in this particular case of the limitation of a fee which must of necessity come to an end, the reversionary interest is a reversion, and yet no remainder can be limited expectant upon the fee because a remainder can never be limited expectant upon a fee. This case is peculiar in another respect, as it is the only case in which there can be a fee which cannot by possibility endure forever.

The estate tail, although an estate of inheritance, is technically and properly not a fee, although the books carelessly sometimes call it a fee. The simplest illustration of it is a limitation to A and the heirs of his body. This leaves a reversion in the grantor, for in law it is regarded as certain that the issue of A, if he have any, will at some time become extinct, therefore that the estate must sooner or later come to an end.<sup>3</sup> And, moreover, the Statute De Donis, which created the estate tail, expressly calls the reversionary right a reversion. But the reason last mentioned we do not regard as the better reason, for as, Pollock and Maitland have pointed out, it is not probable that at the time of De Donis the subtle distinction between the reversion and the possibility of reverter had suggested itself to the legal mind.<sup>4</sup> The above explana-

<sup>1</sup> *Eyres v. Faulkland*, 1 Salk. 231; s. c. 1 Ld. Raymond, 326, cited in Gray on Perp. § 33, cl. 7.

<sup>2</sup> See the authorities in note 2, page 86, above.

<sup>3</sup> Smith's Essay, §§ 192-194, and see Fearne on Rem. 7, note.

<sup>4</sup> 2 Pollock & Maitland, 21, 23 and note.

tion as to the distinction between the reversion and the possibility of reverter will require to be qualified or added to when we have explained the subject of the contingent remainder in fee; but, at this point, it would confuse the reader to introduce that element.

The question as to the ultimate extinction of issue is the same in the fee simple conditional and in the estate tail. But in the case of the fee simple conditional the reversionary interest is a possibility of reverter. In the case of the estate tail the reversionary interest is a reversion. It is a possibility of reverter in the former case because there was a chance that the grantee would have issue and thereupon create a fee simple absolute, thus cutting off the reversionary interest, hence a possibility of reverter. It is true that about two centuries after the Statute De Donis above mentioned, it became possible for a tenant in tail to cut off the reversion by a common recovery; but this has not changed the reversion subject to an estate tail into a possibility of reverter, and a vested remainder, though liable to be destroyed by a common recovery, is still a vested remainder. These last statements, although premature, are introduced here because we are treating of the reversion, possibility of reverter, and remainder. In the next chapter these propositions will appear more plainly.

A remainder may be defined as follows: A remainder is of that portion of the entire fee, a part or the whole of which portion is limited to take effect after the natural expiration of the particular estate; and by natural expiration, we mean that the particular estate must not be abridged or cut short. The only estates capable of being the particular estate are estates for life and estates tail; and the remainder must itself be likewise of a freehold estate. It is common usage, however, to call a freehold estate expectant upon a term of years a remainder, thus, to A for years, remainder to B and his heirs.

One of the great rules of the remainder is that it must be created at the same time as the particular estate. If there

be an estate given to A for life or for years, it is not good at common law for the grantor afterward to confirm this by a deed to A for life, or for years, as the case may be, the remainder to B and his heirs, because the particular estate is not enlarged, and the deed cannot operate as an assignment of the reversion, because the remainderman is not a party to the deed. The remainder, then, must be created at the same time as the particular estate. But if there be a conveyance to A *per autre vie*, the grantor may by a deed confirm this to A for his own life, remainder to B and his heirs. Here the particular estate is enlarged, and the remainder is good.<sup>1</sup>

A very common statement of the books is that a remainder is so called because it is a remnant of the entire fee, something left over, as it were, after the particular estate. But Pollock and Maitland tell us that it is so called because it stays out, and that the verb *remanere*, to stay out, is older than the word "remainder." It stays out and does not revert.<sup>2</sup>

The remainder is the only estate which at the common law can be created to begin *in futuro*. We here use the word "estate" strictly, for a term of years is strictly speaking not an estate.<sup>3</sup> The Statute of Uses and the Statute of Wills, both in the reign of Henry VIII., greatly enlarged the power to create estates. But if you find in a will or in a limitation to uses an interest in real estate which can take effect as a remainder, the courts will hold that it shall do so; so that the old common-law estate of the remainder is in every-day use as much as it ever was.

We have seen that remainders and reversions expectant upon freehold estates are incorporeal rights, and like other incorporeal rights they were commonly conveyed by deed of grant. Suppose, then, that there be a limitation to A for

<sup>1</sup> Doctor and Student, Dial. 2, ch. 20; Brooke's Abr. tit. "Done and Remainder," 45, and tit. "Estates," 80; Co. Litt. 143 a; Viner's Abr. tit. "Remainder," C. pl. 1; Plowd. 25 a, 35 a.

<sup>2</sup> 2 Pollock & Maitland, 21 and note.

<sup>3</sup> Challis, R. P. (2d ed.) 58.

life, remainder to B and his heirs. B may grant his estate to X and his heirs by deed of grant. Suppose, however, that the remainder or the reversion be expectant upon a term of years, thus, to A for years, in which case we have a reversion, or to A for years, remainder to B and his heirs. Now the reversion and the remainder may here be conveyed by deed of grant,<sup>1</sup> but in these cases they could be conveyed likewise by feoffment, provided that the termor would allow an entry upon the land for the purpose of making the feoffment.<sup>2</sup> In these cases we would not call the remainder and the reversion incorporeal rights. We would prefer to consider them as corporeal hereditaments, because the remainderman or the reversioner has the actual seisin, as shown in an earlier chapter, the particular interest being a mere term of years. The remainder and the reversion, in the case in which the particular estate is for life, cannot be conveyed by a feoffment, even though the tenant of the particular estate should permit an entry to be made upon the land for that purpose. It has already been shown that a feoffment must take effect immediately or not at all. Therefore, the conveyance by feoffment must transfer the seisin immediately. But it is not the intention that the reversioner or remainderman shall disseise the tenant of the particular estate. The result is that the reversioner or remainderman upon entering by permission is a mere licensee. As a mere licensee he has not the seisin and cannot make a feoffment of the estate.

A possibility of reverter, however, is not assignable. It descends to the heirs, but it is not assignable; nor can it be said to be devisable,<sup>3</sup> except that under some statutes in certain jurisdictions, courts have held that the statute was broad

<sup>1</sup> 1 Preston on Conv. 41, 42; 2 Preston on Conv. 209.

<sup>2</sup> Williams, R. P. 243.

<sup>3</sup> 4 Kent's Com. 259; Cornish on Rem. 178; 2 Preston's Abstr. 104, 105; Tied. R. P. §§ 385, 398; 2 Wash. R. P. 802 (5th ed.); Nicoll v. R. R. Co., 12 N. Y. 134; *Pearse v. Killian*, 1 McMullan (Eq.) (S. C.), 233; *Fearne* on Rem. 381, note; *Trustees v. Venable*, 42 N. E. Rep. 836 (Ill.).



enough to enable an owner of a possibility of reverter to pass it by his will. Continuing this point we must explain that the fee simple conditional was by De Donis done away with for most purposes. But in England there are copyhold estates. In our first chapter we gave an account of the copyhold estate, and to that we will now refer. If there be a limitation of a copyhold estate to A and the heirs of his body, which would be an estate tail in a freehold estate, it is a fee simple conditional in a copyhold estate if there be no custom of the manor to entail. Thus there is a possibility of reverter; and a few years ago the question arose in England whether this was devisable, and it was held in *Pemberton v. Barnes*<sup>1</sup> to be devisable under the latitude of the modern English Statute of Wills. But in *Trustees v. Venable*<sup>2</sup> it was held that the reversionary right remaining in the grantor upon a limitation to a corporation was a possibility of reverter, and was not devisable under the statutes of Illinois.

Down to the time of the Statute of Anne (4 Anne, ch. 16) upon the assignment of a reversion, whether the reversion were expectant upon a term of years or upon a freehold estate, it was necessary for the tenant of the particular estate to attorn to the grantee of the reversion. This necessity was abolished by the above statute, which is the same statute as that referred to in Chapter II. in connection with the alienation of the seignory. However, there was no necessity for an attornment if the alienation of the reversion were by a common-law fine or were by a conveyance operating under the Statute of Uses or, it seems, if it were by a devise.<sup>3</sup>

Reversions and remainders could be assigned by fine and by recovery, but as above stated the common method was by deed of grant.

If there be a feoffment to A for life, remainder to B and

<sup>1</sup> *Pemberton v. Barnes* (1899), 1 Ch. 544.

<sup>2</sup> *Trustees v. Venable*, 42 N. E. Rep. 836 (Ill.).

<sup>3</sup> *Watkins on Descents*, 110; 2 *Black. Com.* 317; 2 *Wash. R. P.* 389; *Williams, R. P.* 247, 323, 324; 1 *Gray's Cases on Prop.* 441, 442.

his heirs, the livery of seisin is made to A, who has the actual seisin. If the feoffment be to A for years, remainder to B and his heirs, the livery of seisin is likewise made to A, but the seisin instantaneously passes to B. In the first case, upon the death of A the seisin immediately passes to B.<sup>1</sup> If there be a limitation of successive terms of years, thus to A for years, remainder to B for years, this is not a true remainder, although sometimes spoken of as a remainder. The seisin is never parted with by the grantor. Now, as to a limitation to A for life, remainder to B and his heirs, we have in a previous chapter said that sometimes B is spoken of as seised in law, but that the significance of the expression was nothing more than that it served to indicate that the inheritance was fixed in him. There is a sense, however, in which at the common law there is a true seisin in law in the party entitled in remainder or in reversion, and that is in respect to the subject of the descent of the remainder and reversion. A fee simple in possession descended at the common law to the heir of the person last actually seised. This heir must enter to make himself a new stock of descent, for the heir of the ancestor at some later time was not necessarily the heir of this heir. So that if the party entitled to enter as heir died without an entry, although, as we have already seen, his widow would be entitled to dower because he had seisin in law and had the right immediately to the actual seisin, yet if he did not take the actual seisin and died, the land was not transmitted to his heir as such, but to the heir of the person last actually seised. And in regard to remainders in fee simple, the person entitled is the one who can predicate heirship of the first remainderman when the particular estate expires. Suppose, then, there be a limitation to A for life, remainder to B and his heirs; B dies; whoever is his heir when A dies is entitled

<sup>1</sup> Litt. § 60; *Vanderheyden v. Crandall*, 2 Denio, 21; s. c. 1 N. Y. 491; 2 Black. Com. 166; 2 Cruise's Dig. 334; *Fearne on Rem.* 10, note H, 307, 308; 1 *Preston on Estates*, 91; *In re Herbage Rents* (1896), 2 Ch. 821, 822; 1 Wash. R. P. 37; 2 Wash. R. P. 259.

to enter and at that time has the true seisin in law, and by his entry he makes himself a new stock of descent.<sup>1</sup> The same principle applies to the descent of a reversion in fee simple expectant upon a freehold particular estate. If X be the owner of land in fee simple and dies actually seised, or if he has made a conveyance to A for life, or if he has made a conveyance to A for life, remainder to B and his heirs, the principle as to the matter of common-law descent involves the same idea for each case. It is true that in the case of the remainder B is not the person last actually seised; but his position as the remainderman is the equivalent to the position of X in the other two cases. Now, if the particular estate in the case of the remainder or the reversion be a mere term of years, the remainderman or reversioner has the actual seisin; and the presence of a tenant for years at the common law avoids the necessity of entry. But in the United States vested remainders and reversions in fee simple and estates in possession descend to the person who can predicate heirship when the ancestor dies.<sup>2</sup> The result is that under modern law, it is in every case the actual seisin which passes when the particular freehold estate expires.

<sup>1</sup> Watkins on Descents, 24, 25, 28, 29, 41, 42, 120, 121.

<sup>2</sup> Winslow v. Goodwin, 7 Met. 383; Cook v. Hammond, 4 Mason, 467; 4 Kent's Com. 388, 389; 2 Wash. R. P. 391, 392, 410; 3 Shars. & Budd, 408, 409; Miller v. Miller, 10 Met. 393.

## CHAPTER X.

THE FEE SIMPLE CONDITIONAL, ESTATE TAIL, AND  
BASE FEE.

IN Chapter IV. we enumerated five estates of inheritance which are less in quantity than the pure fee simple or fee simple absolute, and we explained two of these five classes. We think it now suitable to take up the three remaining classes which are the fee simple conditional at the common law, the fee tail or estate tail, and the base fee. We will begin with the fee simple conditional at the common law.

The fee simple conditional was for the most part done away with by the Statute De Donis. This statute created the estate tail, and the estate tail was found to a considerable extent in the American colonies, which is equivalent to saying that the Statute De Donis was accepted by the colonists as a part of their law. But De Donis was never recognized in South Carolina, so that in that state they still have the fee simple conditional, and not the estate tail.<sup>1</sup> The simplest form of limiting the fee simple conditional is a limitation to A and the heirs of his body. Now, among the Saxons there was a disposition in the time of King Alfred to render estates which were to descend in the family, inalienable, and in that reign it was enacted that such estates could be rendered inalienable so that nobody in the line of ownership could convey the land away from the family. But to secure this result it was necessary that a declaration to the effect that it should be inalienable must be made in the presence of the kindred and before the king and the bishop. Thus, land would be ren-

<sup>1</sup> Gray on Perp. §§ 14, 313; 1 Shars. & Budd, 94.

dered inalienable, and this would manifestly tend to preserve the greatness of the family.<sup>1</sup> This kind of gift prevailed in England down to and long after the Conquest, and was known among the English as the fee simple conditional, and it persisted until early in the reign of Edward I., when by a piece of judicial legislation it came to be held by the courts that upon the birth of issue the tenant should have the right to alienate the land and pass a pure fee simple. It was held that not only on the birth of issue could the tenant alienate, but that if he failed to do so, the issue could do it, and that there was no necessity in the latter case that the issue should have issue. The courts said that upon birth of issue the condition was performed, so that the tenant could create a good fee simple. But if the grantee should die no issue of him surviving, or upon the ultimate extinction of issue, the land would revert to the lord, if there had been no alienation. In the case of an alienation after birth of issue the possibility of reverter was cut off,<sup>2</sup> and in the last chapter we pointed out that the reversionary right in this case is a possibility of reverter.

It has been a puzzle to account for the implication of a condition by the court. These gifts were frequently made to A and the heirs of his body, but often the form of gift was, to A and his heirs, if he shall have an heir of his body. The intention in this latter case was like that in the former case, that is, merely with reference to the method of descent, intending that it should go to the heirs of the body, and that it should revert if there should be none such, or if they should become extinct. The courts, however, it has been suggested, misinterpreted the meaning of these words, and held that the

<sup>1</sup> 1 Spence, Eq. Jur. 21, 141.

<sup>2</sup> 1 Spence, Eq. Jur. 21, 141; Croxall's Lessee v. Sherrerd, 5 Wall. 284; Williams, R. P. 42, 43; 1 Wash. R. P. 66, 67; Williams, R. P. (17th ed.) 86, 87; 2 Pollock & Maitland, 17-19; 1 Leake, 35; Challis, R. P. 212; Bacon's Abr., "Estate Tail," p. 257; 2 Preston on Estates, 302, 303, 304; Cruise's Dig. tit. 2, ch. 1, §§ 4 and 5 (Am. ed. 1827).

gift was conditional, so that if there should be an heir of the body the tenant could treat it as a fee simple and pass a fee simple to his grantee; in other words, to use the language above, the condition was performed upon the birth of issue.<sup>1</sup>

Sometimes in those days they called this reverting an escheating, just as sometimes in those days they called what we speak of as an escheating, a reverting.<sup>2</sup>

It may be well to mention that a tenant in fee simple conditional might make an alienation before issue born, and that in this case his alienation was good as against issue afterward born, but that the alienation did not cut off the donor's possibility of reverter. The donor, however, must await the extinction of issue in such a case before he could defeat the fee which had been granted. The reason is that the alienation was good as against the issue, and that the donor's estate could not be accelerated by the circumstance that the donee had alienated before the birth of that issue.<sup>3</sup> Then, again, if the tenant in fee simple conditional had issue which became extinct before he had made an alienation, his alienation did not bar the right of the donor.<sup>4</sup>

Now, the great lords were dissatisfied with the construction which the courts had come to put upon these gifts, and they persuaded Edward I. to agree to the celebrated Statute of Westminster II., *De Donis Conditionalibus*, or briefly, *De Donis*, 13 Edward I., A. D. 1285. It was this full establish-

<sup>1</sup> 2 Pollock & Maitland, 18. The following reasons have been given why, after issue born, the donor was barred by an alienation: (1) That the estate of the purchaser should not be avoided by a remote possibility, namely, that of the issue becoming extinct; (2) that otherwise it would be "in a manner a perpetuity," that is, a restraint of alienation forever. 2 Preston on Estates, 289, 300, 301, 306, 307, 345, 346.

<sup>2</sup> 2 Pollock & Maitland, 22, 23.

<sup>3</sup> 1 Smith's Real & Personal Prop. 165; Cruise's Dig. tit. 2, ch. 1, § 6; 1 Greenleaf, Cruise, tit. 2, ch. 1, § 6, p. 68; Bacon's Abr., "Estate Tail," 257; 2 Preston on Estates, 301, 302, 329-332, 347; Sullivan's Lectures (2d London ed. 1776), 159; Coke, 2d Inst. 333; 7 Coke's Rep. 35; Willion v. Berkley, Plowd. 245. But see note to Co. Litt. 327 a.

<sup>4</sup> 2 Preston on Estates, 329; Co. Litt. 19 a.

ment of the fee simple conditional which caused the barons to get Edward I. to agree to the Statute De Donis, whereby these estates should become inalienable.<sup>1</sup>

Of course, the inability to alien the estate and thereby to take it out of the family tended to preserve the greatness of families, and one of the purposes which the barons had in mind in procuring De Donis was to preserve the land in the family.<sup>2</sup> And that classic of the law, "Doctor and Student," further tells us that one of the purposes of De Donis was to keep men from falling into extreme poverty by squandering their property through the alienation thereof.<sup>3</sup> Another purpose was this: The fee simple conditional, before the great change took place of making it alienable upon birth of issue, could only be forfeited for treason or felony during the life of the offender; but upon its becoming an alienable estate, it was treated as a fee simple and thus exposed to forfeiture completely for treason or felony.<sup>4</sup> In those days, attainders of treason were very common, and many great men were struck down by royal authority. As to its being treated as a fee simple, Lord Coke calls it a fee simple, although we see that it was not a pure fee simple or fee simple absolute. Another reason has been given, which is as follows: The Crown, in order to injure the barons, had become accustomed to divide any feud which had escheated to it, or was forfeited to it, and to give it out in lesser feuds; and the barons, for their own protection, desired to get an estate which should be free from forfeiture except during the life of the offender.<sup>5</sup> De Donis, then, restored in effect the ancient law of King Alfred for the preservation of entails.

The formula of an estate tail is to A and the heirs of his

<sup>1</sup> See the authorities in note 2, page 95, above.

<sup>2</sup> 2 Preston on Estates, 453; Cruise's Dig. tit. 2, ch. 1, § 8 (Am. ed. 1827).

<sup>3</sup> Doctor and Student, Dialogue 1, ch. 26.

<sup>4</sup> Cruise's Dig. tit. 2, ch. 1, § 5 (Am. ed. 1827); Co. Litt. 19 a, 392 b.

<sup>5</sup> Bacon's Abr., "Estate Tail," p. 257; 2 Preston on Estates, 303, 304

body, in which case the heirs of the body take by descent. It may likewise be to the heirs of the body of A, in which case they take as purchasers. Estates tail are divided into general and special. Each of these may again be in tail male or tail female. To A and the heirs of his body is an estate tail general; to A and the heirs male of his body is an estate tail male general; to A and the heirs of his body on his wife B begotten or to be begotten is an estate tail special limiting the descent to the issue of a particular marriage, and this may be confined to either sex.<sup>1</sup> Suppose there be an estate tail male and an estate tail female, and the owner of these two estates should die leaving as his heir a daughter, and that her heir be her son, this grandson can inherit neither estate, not the estate tail male, because it cannot go down except wholly in the male line, nor the estate tail female, because the grandson is not of the sex to which the estate is limited.<sup>2</sup>

It is said that the origin of the expression fee tail is the old mediæval Latin *feudum talliatum*, corresponding as to the last word to the barbarous Latin *taliare*, which means to cut, as to which we have from the same root our English word tailor; *feudum talliatum*, a cut or mutilated or truncated fee, from which the heirs general are cut off, the limitation being confined to the heirs of the body.<sup>3</sup>

As to what things may be entailed under De Donis, the corporeal hereditament and those incorporeal hereditaments which savor of the realty, of which a most excellent illustration is rents; and reversions in fee simple and remainders in fee simple may likewise be entailed; they may be said to savor of the realty. For illustration, a limitation to A for life, remainder to B and his heirs, B can convey his remainder to X and the heirs of his body, leaving, of course, the reversion expectant upon the estate tail in himself, B.<sup>4</sup>

<sup>1</sup> 2 Black. Com. 114.

<sup>2</sup> 2 Black. Com. 114.

<sup>3</sup> 2 Black. Com. 112, note; 2 Pollock & Maitland, 19, note.

<sup>4</sup> 2 Preston on Estates, 456; 2 Preston's Abstr. 86, 87; Co. Litt.



The Statute De Donis is in Latin, and uses the word *tenementum*. Now, while strictly speaking, an incorporeal hereditament is not a *tenementum*, yet the word *tenementum*, or tenement, is, as has been already shown, often used in a very general sense, and it has always been the case throughout the ages to use the word loosely.

We notice that the Statute De Donis was passed in 1285, and *Quia Emptores* five years afterwards, in 1290. Now, of all the great historical landmarks in the history of English law and of English institutions, none are greater than these two statutes. They interest not only the lawyer, but the scholar and historian. They both exercised a profound effect upon the law and upon government. *Quia Emptores* freed to some extent the alienation of land, as has been shown. De Donis to some extent restrained the alienation of land. The interval of five years between these two great statutes, curiously enough, we notice again, centuries later, between the Statute of Uses and the Statute of Wills, both of them passed in the reign of Henry VIII., although there were several statutes of wills passed within a few years of the first one.

It was about two hundred years after De Donis that it became possible completely to nullify the effect of that statute. This was by the very celebrated case known as Taltarum's Case. This case was decided in the twelfth year of Edward IV., which was the year 1472. We see, then, that for a period of time longer ago than the discovery of America, it has been impossible for a man to tie up land by a perpetual restraint upon alienation. The effect of Taltarum's Case is that a tenant in tail can, by suffering a common recovery, pass a fee simple absolute, and thus defeat all limitations over, and the reversion and the rights of the issue in tail. The evils attending the restriction upon alienation were found so grievous that the courts by this judicial legislation deter-

(Hargrave's & Butler's notes), 20 a, note; Tudor's Lead. Cases (3d ed.), 748-750; Williams on Seisin, 166; Fearn on Rem. 447-449 *et seq.*

mined to put a stop to them, and they would not allow any provision contained in a transfer of land to prevent the operation of a common recovery.<sup>1</sup>

Lord Coke condemns the Statute De Donis; his language is as follows: "When all estates were fee simple, then were purchasers sure of their purchases, farmers of their leases, creditors of their debts, the king and lords had their escheats, forfeitures, wardships, and other profits of their seignories; and for these and other like cases, by the wisdom of the common law, all estates of inheritance were fee simple; and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, daily experience teacheth us."<sup>2</sup>

The fee simple conditional, with the right of alienation upon birth of issue, was a fee simple. And it is in this sense that Coke speaks of "all" estates of inheritance as having been at common law, fees simple.<sup>3</sup> Coke has made a slip in the remarks above quoted from him, in saying that creditors were sure of their debts, because the first statute for taking land for debt was not passed until after the Statute De Donis, although it was passed in the same year in which De Donis was passed.<sup>4</sup> It is very plain that after De Donis purchasers were not sure of their purchases, nor farmers of their leases; because the tenant in tail could not bind the heir in tail by sale or lease.<sup>5</sup> And innumerable latent entails were produced to deprive purchasers of the land they had fairly bought.<sup>6</sup> But after Taltarum's Case the tenant in tail could suffer a

<sup>1</sup> See, for instance, *Van Grutten v. Foxwell* (1897), App. Cas. 691, 692.

<sup>2</sup> Co. Litt. 19 b. See also *Mildmay's Case*, 6 Coke, 40 a.

<sup>3</sup> 2 Preston on Estates, 328, 331, 339-341; *Willion v. Berkley*, Plowd. 235 *et seq.*; Coke's 2d Inst. 333; Co. Litt. 19 a. See 2 Law Quart. Rev. 276, 409.

<sup>4</sup> Sullivan's Law Lectures (2d ed. London, 1776), 162.

<sup>5</sup> Tudor's Lead. Cases (3d ed.), 746; 2 Preston on Estates, 376; Williams, R. P. 44.

<sup>6</sup> 2 Black. Com. 116; Williams, R. P. 44.

recovery ; and a recovery did not avoid, but affirmed a lease or charge. Sheppard's Touchstone puts it this way: that if the tenant in tail make a lease or enter into a statute, (by this latter is meant statute-merchant or statute-staple, each of which was a security for debt, being a charge upon the land therefor),<sup>1</sup> and then suffer a common recovery of the land, the recovery does not avoid, but affirms the lease or charge ; " for, whereas it was before avoidable by the issue in tail," now it is good, " and the recoveror also shall hold it charged and subject to the lease and charge of the tenant in tail." <sup>2</sup> It seems that the lease or charge is good as against all but the issue in tail, and remainders and reversions and any other estates subject to the estate tail, and that the recovery bars all these.<sup>3</sup> As to the king and lords being deprived of their escheats and forfeitures, escheat and forfeiture to the king were in a sense the same thing, escheat being failure of heirs ; and the failure of heirs might happen either by there being none, or by the blood being corrupted by the commission of treason or felony ; whereas the estate tail, established by the Statute De Donis, could not be forfeited for treason or felony except during the life of the offender.<sup>4</sup> But later by Statute 26 Hen. VIII. ch. 13, estates tail were made forfeitable for high treason.<sup>5</sup> But upon failure of issue in tail, the remainderman or reversioner became entitled.<sup>6</sup> At the common law, besides the forfeiture of the land of the offender for treason or felony, there was the element of corruption of blood, which was an especially dreadful thing.

<sup>1</sup> 2 Black. Com. 160.

<sup>2</sup> Sheppard's Touch. 41.

<sup>3</sup> 1 Preston on Conv. 16, 141 ; 2 Preston on Conv. 132.

<sup>4</sup> Sullivan's Law Lectures (2d ed. London, 1776), 159, 160, 382 ; Tudor's Lead. Cases (3d ed.), 786, 787 ; Co. Litt. 392 a, b. ; Litt. § 747.

<sup>5</sup> St. 26 Hen. VIII. ch. 13 ; Co. Litt. 392 a, b ; Williams, R. P. 57 ; Tudor's Lead. Cases (3d ed.), 786, 787.

<sup>6</sup> Tudor's Lead. Cases (3d ed.), 786. See further, St. 33 Hen. VIII. ch. 20 ; 2 Preston on Estates, 357, 358 ; St. 5 & 6 Edw. VI. ch. 11, § 9.

The blood of the offender became corrupted, as the legal phrase is. The corruption of blood deprived the heir of the offender of the right to inherit from any ancestor whatever.<sup>1</sup>

Continuing now, as to the king and lords being deprived of their forfeitures and escheats, above mentioned, the theory was brought into England with the Conquest that the feudal bond was broken by commission by the vassal of crime which corrupted the blood, so that (1) the estate fell back to the lord, and (2) the inheritable quality of his blood was extinguished. But there was also, and independently of the Conquest, the political law of forfeiture; and in the case of felony other than treason, the estate was forfeited to the king for a year and a day and waste; which latter was the wasting by the king of the felon's lands and houses by destroying his houses and ruining his land; whereupon the forfeiture terminated, and then the property went to the lord by escheat, the heir of the felon being blotted out. But in the case of treason, the law of forfeiture left the estate in the king.<sup>2</sup> The estate tail, however, was a special case as above shown. Treason was a felony;<sup>3</sup> but the term "treason" came in time, and at an early time, to be used as distinguishable from felony.<sup>4</sup>

As to the "other profits of their seignories" mentioned above by Coke, there was "primer seisin," explained below.

The only remaining question is as to the meaning of Lord Coke's expression that the king and the lords lost their wardships by the enactment of the Statute De Donis. In the days of feudalism, wardship was the most valuable fruit of tenure.<sup>5</sup> In Littleton, § 103, it is laid down that if the tenant of land holden by knight service, die, leaving an heir male under

<sup>1</sup> Co. Litt. 392 a, b.

<sup>2</sup> 2 Black. Com. 251, 252; 4 Gray's Cases on Prop. 5, note; Tudor's Lead. Cases (3d ed.), 785 *et seq.*; 3 Shars. & Budd, 490; Co. Litt. 392 b; St. 17 Edw. II. St. 2, ch. 16; 1 Rev. Stats. p. 137; Coke's 2d Inst. 37; Coke's 3d Inst. 47; 1 Stephen's Commentaries (8th ed.), 439 *et seq.*

<sup>3</sup> 2 Pollock & Maitland, 465, note, 500.

<sup>4</sup> 2 Pollock & Maitland, 498, 500.

<sup>5</sup> Preston on Estates, 296, 297.

twenty-one years of age, the lord shall have the land until the heir attains to the age of twenty-one years; because the heir, by intendment of the law, is not able to do such knight service before the age of twenty-one years; and if the heir be not married at the death of the ancestor, "then the lord shall have the wardship and marriage of him." But if the heir be an heir female, of fourteen years or over, "then the lord shall not have the wardship of the land, nor of the body; because that a woman of such age may have a husband able to do knight service." But that if the heir be an heir female, "and be married within the age of fourteen years, in the life of her ancestor," and if she be within that age at the death of her ancestor, "the lord shall have only the wardship of the land, until the end of the fourteen years of the age of such heir female; and then her husband and she may enter into the land and oust the lord."<sup>1</sup> The lord, during the vassal's minority, had the guardianship of his person, and also of his lands, taking the profits thereof; and this right in the lands was, in law, regarded as a term of years for the number of years until the ward's majority should be attained, which right was a chattel interest; and, in case of the death of the lord during the minority of the ward, it went to the executors of the lord.<sup>2</sup>

The Statute of Marlebridge, 52 Hen. III. ch. 6, among other things provided that a chief lord should not lose "his ward" by a feoffment made to an elder son and his heirs, being within age, to defraud the lords "of the fee of the wardships."<sup>3</sup> Under the provisions of this Statute of Marlebridge it was "collusion" for a man holding by knight service to enfeoff his eldest son; because, as the Court declares in Sir George Curson's case, everybody would do so, if that were

<sup>1</sup> Litt. § 103; Co. Litt. 76 b, 77 a.

<sup>2</sup> Sullivan's Law Lectures (2d London ed. 1776), 123, 125, 126; Doctor and Student, Dialogue 2, ch. 12.

<sup>3</sup> St. of Marlebridge, 52 Hen. III. ch. 6; Coke's 2d Inst. vol. i. p. 109.

allowed, in order to avoid wardships. The son thus would take by purchase instead of by descent, if that were allowed. And for the reason above given, that to allow it would defeat wardship, a man could not enfeoff his collateral heir apparent.<sup>1</sup> The "collusion" above referred to, involved also any such conveyance to deprive the king of his wardship, and to deprive the king of his primer seisin.<sup>2</sup> Primer seisin was the one year's profit of the land which the heir of a tenant *in capite* owed the king upon the death of the ancestor, provided the heir was of full age at the death of the ancestor. If under age, there would be wardship.<sup>3</sup> But after the Statute of Wills (32, 34, & 35 Hen. VIII.), there could be a conveyance in fee simple by a father to any of his children made to defraud the king or other lord of his wardship, which would be good as to two-thirds of the land.<sup>4</sup> Coke says (2d Inst. Vol. I. page 110, being a treatise upon the said Statute of Marlebridge, 52 Hen. III.), that a lease for life or a gift in tail by an ancestor to his heir apparent was not within the prohibition of that statute, so that such a gift was good.<sup>5</sup>

Thus it is explained what is the meaning of Lord Coke's above expression that the king and the lords lost their wardships by the enactment of the Statute De Donis.

In *Willion v. Berkley*<sup>6</sup> it is said that in 4 Hen. VI.<sup>7</sup> a tenant in fee simple who held of the king *in capite*, "made a gift in tail to hold of the chief lord of the fee." The donee died leaving issue under age; and it was held that the donor and

<sup>1</sup> Sir George Curson's Case, 6 Coke's Rep. 75 b; Sheppard's Touch. (by Preston) 68.

<sup>2</sup> Sir George Curson's Case, 6 Coke's Rep. 75 b; Myght's Case, 8 Coke's Rep. 164 a, b.

<sup>3</sup> Co. Litt. 77 a; 1 Greenleaf, Cruise, 26.

<sup>4</sup> St. of Wills, 32, 34, & 35 Hen. VIII.; Coke's 2d Inst. vol. i. p. 111.

<sup>5</sup> Coke's 2d Inst. vol. i. p. 110; Sir George Curson's Case, 6 Coke's Rep. 75 b; Myght's Case, 8 Coke's Rep. 164 a, b; Co. Litt. 78 a; Coke's 2d Inst. vol. i. 109.

<sup>6</sup> *Willion v. Berkley*, Plowd. pp. 237, 233, 241, 249.

<sup>7</sup> 4 Hen. VI. 19, pl. 6.

not the lord paramount, the king, should have the wardship of the infant heir. The foregoing decision of 4 Hen. VI. was of course made after *Quia Emptores* and De Donis. The question was whether the king was bound by De Donis, and it was held that he was bound. The argument was, that if the king were not bound by De Donis, and thus the donee, as to the king, should not be affected by De Donis, then that, as to the king, the donee would have not an estate tail, but would have a fee simple conditional; and that if the donee had thus a fee simple conditional, which is a fee simple, the donor, since *Quia Emptores*, must have been, by his conveyance, out of the transaction, out of the line of tenure; but that, as it was held that the king was bound by De Donis, the privilege of wardship was given to the donor.

We have above shown the powerful effect of a common recovery suffered by a tenant in tail after Taltarum's Case; but fines and feoffments had previously long been in use by tenants in tail. But the effect of these conveyances was merely to produce what is called a discontinuance.<sup>1</sup> There are three things which are distinct from each other: (1) right of entry, (2) right of action, and (3) actual barring. Now a feoffment or fine by a tenant in tail reduced the issue in tail to a right of action, and reduced the vested remainderman and the reversioner to a right of action. This was less than a right of entry, but they were not barred;<sup>2</sup> and the action must be a real action. Ejectment was not sufficient. It must be a formedon in descender or a formedon in remainder or a formedon in reverter, as the case may be.<sup>3</sup> After the Statute of Uses in the reign of Henry VIII., certain new conveyances grew up under that statute, one of which was the statute of

<sup>1</sup> Co. Litt. 325 a, b, and note by Butler; 3 Greenleaf, Cruise, 315; 1 Greenleaf, Cruise, 78-80; 2 Greenleaf, Cruise, 245; 1 Preston on Conv. 213, 214; 1 Saunders' Rep. 258 a, note 8, 319, note 1, note a; Littleton, § 595; Co. Litt. 327 a, note by Butler; Co. Litt. 330 a, note by Butler.

<sup>2</sup> See the authorities in note 1, above.

<sup>3</sup> 1 Preston on Conv. 206, 207.

uses conveyance of lease and release; and a conveyance by a tenant in tail by one of these conveyances reduced the aggrieved party to a right of entry, which was better for him than to be reduced to a right of action; and the old common-law conveyance of lease and release, already explained, had the same effect. It reduced the aggrieved party to a right of entry.<sup>1</sup> It was better to have a right of entry than a right of action, because the party had merely to enter upon the land and was not put to the inconvenience, expense, and uncertainty of fighting for his claim in the courts of law. But in the reigns of Henry VII. and Henry VIII., statutes were passed under which the fine with proclamations came into use. This was later, of course, than the power acquired under *Taltarum's Case* to convey by common recovery. A fine with proclamations was a fine which was proclaimed in court by being read a certain number of times for the purpose of notoriety.<sup>2</sup> It had the effect actually to bar the issue in tail, but not vested remaindermen or the reversioner, unless they became barred by five years' non-claim,<sup>3</sup> which matter we will

<sup>1</sup> 1 Shars. & Budd, 108; 1 Greenleaf, Cruise, 80; Butler's note, Co. Litt. § 612. It would be inferred from Littleton, § 606 *et seq.*, in case of a common-law lease and release by a tenant in tail, that only an estate for the life of the tenant in tail passed, and not a base fee. But it is said that Littleton is not to be understood literally; and that all he means is that the grantee has not an indefeasible estate for longer than the life of the tenant in tail. 1 Saunders' Rep. 260, note 1. And so Butler says in his note to § 612; and that the grantee has a base fee. Butler also shows that in the case of the common law conveyance of lease and release, and in the case of the Statute of Uses conveyances of bargain and sale, covenant to stand seised, and lease and release, the issue upon the death of the tenant in tail may either enter, or if the issue prefers, may bring an action. See also 1 Greenleaf, Cruise, 80.

<sup>2</sup> St. 4 Henry VII. ch. 24; St. 32 Hen. VIII. ch. 36; 2 Black. Com. 118, 352, note, 354-357; 1 Saunders' Rep. 258 a, note 8; Williams, R. P. 48-50; 1 Preston on Conv. 213, 214.

<sup>3</sup> See the authorities in note 2, above; 2 Black. Com. 356; 1 Saunders' Rep. 319, note 1; 2 Smith's Real and Per. Prop. (5th ed.) 977, 978; 1 Preston on Conv. 310; Williams, R. P. 49, 50; Co. Litt. 372 a; Shepard's Touchstone, 22 and note 3; Cruise's Dig. tit. 35, ch. 11, §§ 3, 4, 23; 1 Hayes on Conv. (5th ed.) 141, 142.



explain a little later. Now, then, if a tenant in tail conveyed a fee simple, he thereby created a base fee. Of course, it could be defeated, as above explained, by an action or by an entry according to circumstances; but until it was defeated, it was a base fee simple. Suppose, then, that a tenant in tail levied a fine with proclamations, the reversioner or vested remainderman had no right of action until the estate tail was spent, as the books express it, that is, until the death of the tenant in tail and the ultimate extinction of the issue in tail.<sup>1</sup> If you assume him to be the first taker, then, of course, the issue in tail must be his issue, because an estate tail is to a man and the heirs of his body. Suppose, then, there be an estate given to A and the heirs of his body, and he levies a fine with proclamations in favor of B and his heirs, B really has an estate to him and his heirs, so long as A has heirs of his body. The fee created to endure at least so long as issue in tail should exist we regard as the true base fee.<sup>2</sup> And so if there be a fee created by a tenant in tail, by common-law fine, or by a feoffment, this is called a base fee.<sup>3</sup> And if a tenant in tail created a fee by conveyance operating under the Statute of Uses, or by a common-law lease and release, this fee is likewise called a base fee.<sup>4</sup> We have pointed out in another connection that the terms "base," "qualified," and "determinable" are often used as convertible terms.

In respect to the time at which the remainderman or the reversioner could come in, in case the tenant in tail had levied

<sup>1</sup> 1 Hayes on Conv. (5th ed.) 141, 142; Sheppard's Touchstone (by Preston), 27; Co. Litt. 330 a, note by Butler.

<sup>2</sup> Challis, R. P. 44, 262, 264 *et seq.*; Co. Litt. 371 a, b; Whiting v. Whiting, 4 Conn. 179; Tudor's Lead. Cases (3d ed.), 743, 745, 747, 748; 2 Black. Com. 117, 303, 357, note; 1 Saunders' Rep. 258 a, note 8, 319, note (1), note a; 3 Greenleaf, Cruise, 315; 1 Greenleaf, Cruise, 78-80; 1 Preston on Conv. 213, 214; 2 Greenleaf, Cruise, 245; Russ v. Alpaugh, 118 Mass. 373.

<sup>3</sup> See the authorities in note 2, above.

<sup>4</sup> 1 Shars. & Budd, 108; 1 Greenleaf, Cruise, 80; Butler's note, Co. Litt. § 612.

a fine with proclamations, and further as to the five years' non-claim: Suppose that there be a limitation to A and the heirs of his body, remainder to B and the heirs of his body, remainder to C and his heirs. A levies a fine with proclamations; B has no right of action until the death of A and the extinction of his issue, and C has no right of action until the death both of A and B, and the extinction of their issue respectively; and they must bring their actions respectively within five years from the time when they become entitled to sue or be barred by the five years' non-claim.<sup>1</sup> It is good sense as well as good law, that the rights of B and his issue, and of C and his heirs should be postponed as above mentioned, for there is no reason why their estates should be accelerated. The estate of B, for instance, ought not to come into possession because of the fine with proclamations any earlier than it would have come into possession had no fine been levied.

But now, we should say that remainders and reversions could be defeated even earlier than *Taltarum's Case*, and issue in tail cut off, by the operation of warranty. A warranty was either lineal or collateral. Lineal warranty was when the estate and the warranty descended in the same line. Collateral warranty was when they descended in different lines. More fully stated, lineal warranty was when the warranty devolved and the right descended from the same person and upon the same person, so that the party had the right as heir and was also the heir within the scope of the warranty; but if the incumbrance of the warranty and the title to the lands were derived in different lines, the warranty was collateral.<sup>2</sup> It was not uncommon, or, at least, it sometimes happened, that a tenant in tail would convey a fee simple and get his elder brother to warrant the title. The elder brother dies without issue and leaves no assets. "Assets" in these connections means estates in fee simple.<sup>3</sup> The tenant in tail dies

<sup>1</sup> 1 Hayes on Conv. (5th ed.) 141, 142.

<sup>2</sup> 1 Preston's Abstr. 410, 411.

<sup>3</sup> Co. Litt. 374 b; Comyn's Dig. Guaranty, H. 4; 1 Sheppard's Touch-

leaving issue but no assets. The issue in tail is barred by the collateral warranty, although no assets have descended upon the issue. The warranty is collateral, because the estate tail has descended in one line and the warranty in another line.<sup>1</sup> Had the tenant in tail made the warranty, instead of getting his elder brother to make it, it would have been lineal warranty. Lineal warranty never barred unless assets descended.<sup>2</sup> Collateral warranty barred whether assets descended or not.<sup>3</sup> Now, the question is whether De Donis could, until *Taltarum's Case*, be completely set aside in case of collateral warranty and no assets. That remaindermen could be barred and issue in tail could be barred by the operation of warranty is certain. But the question is whether the reversioner could likewise be barred by collateral warranty without assets descending. Lord Coke says that in such cases the reversion could be cut off,<sup>4</sup> but we have just above shown his great hostility to the Statute De Donis, and his strong preference for fee simple estates, under which he classes the fee simple conditional; and Blackstone has followed the lead of Coke.<sup>5</sup> But we prefer the authority of *Bole v. Horton*,<sup>6</sup> which recognizes the policy of De Donis. *Bole v. Horton* was this: A man owned land in fee simple, and created an estate tail male in his eldest son, remainder of

stone (by Preston), 192; Rawle on Cov. (5th ed.) §§ 8, note 2, 238; 2 Black. Com. 302; *Russ v. Alpaugh*, 118 Mass. 372; Butler's note, Co. Litt. 373 b.

<sup>1</sup> Rawle on Cov. (5th ed.) §§ 2-10.

<sup>2</sup> Co. Litt. 374 b; Sullivan's Lectures, 164, 165; *Russ v. Alpaugh*, 118 Mass. 372, 373; Rawle on Cov. (5th ed.) §§ 2 *et seq.*; Butler's note, Co. Litt. 373 b.

<sup>3</sup> Sullivan's Lectures, 164, 165; Co. Litt. 374 b; Coke's 2d Inst. 335; 2 Black. Com. 303.

<sup>4</sup> Coke's 2d Inst. 335; Co. Litt. 374 b.

<sup>5</sup> 2 Black. Com. 303. See also *Russ v. Alpaugh*, 118 Mass. 373.

<sup>6</sup> *Bole v. Horton*, Vaughan's Rep. 360. See further, Butler's note, Co. Litt. 373 b; Cruise's Dig. tit. 32, ch. 4, §§ 20-23 (Am. ed. 1808); Cruise's Dig. tit. 32, ch. 24, § 42 (Am. ed. 1827); Ch. J. Vaughan in *Bole v. Horton*, Vaughan's Rep. 360.

an estate tail male to his younger son. The elder son died without male issue, but leaving two daughters as his heir. We say heir, in the singular, because when two or more women inherited they took as one heir. The younger son conveyed with warranty, and died without issue, and leaving no assets. The fee simple in reversion descended upon the daughters, who were the heir of their grandfather as well as of their father; they were likewise the heir of their uncle, the younger brother. Now, the estate, which was the reversion in fee simple, descended to these daughters in one line, and the warranty in another line. It was therefore collateral warranty, and no assets descended. But we understand that the reversion in the daughters was preserved to them, notwithstanding the collateral warranty; and thus the effect of *De Donis* in building up a reversion in the place of a possibility of reverter, which belonged to the fee simple conditional, was not avoided. Of course if assets had descended that would have entirely altered the case.

The Statute of Gloucester (6 Edw. I. ch. 3), which was enacted before *De Donis*, prevented the operation of collateral warranty except when assets descended in the following case: If a father aliened with warranty, and the son, his heir, thereafter claimed the land in the right of his, the son's, mother, the son being the heir of both parents, the warranty of the father did not bar the son, unless assets descended from the father to the son. If assets descended, it did bar him.<sup>1</sup>

It was by virtue of the equity of the Statute of Gloucester that a lineal warranty of a tenant in tail with assets, barred the issue in tail; and but for the Statute of Gloucester, and the equity resulting therefrom, a lineal warranty by a tenant in tail with assets would not have barred the issue in tail any more than a lineal warranty without assets.<sup>2</sup> It has also been

<sup>1</sup> *Russ v. Alpaugh*, 118 Mass. 372, 373; *Rawle on Cov.* (5th ed.) § 238; *Co. Litt.* 365 a, 366 b; *Coke's 2d Inst.* 292.

<sup>2</sup> *Ch. J. Vaughan in Bole v. Horton*, *Vaughan's Rep.* 365; *Butler's note*, *Co. Litt.* 373 b; *Cruise's Dig.* (Am. ed. 1808) tit. 32, ch. 4, § 20.

said that it was to prevent circuity of action, which would arise if the issue in tail should recover the estate from the alienee, and the alienee should recover the assets from the issue, that a lineal warranty with assets barred the issue in tail.<sup>1</sup> This binding the heir so as to prevent circuity of action is by rebutter. Rebutter is given as a defence to avoid circuity of action, since if the demandant were to recover contrary to the warranty, the other party would recover the same lands, or lands of equal value, by force of the warranty.<sup>2</sup> And it has been said that it was by a kind of analogy to the Statute of Gloucester that a lineal warranty without assets should not bar the issue in tail.<sup>3</sup> The cruel principle involved in the operation of the collateral warranty, when assets did not descend, has been accounted for as follows: that, speaking generally, it was important that persons in possession of land claiming a fee simple should be protected in their titles.<sup>4</sup>

No remainder can be limited expectant upon a fee simple conditional, and the reason is, because a fee simple conditional is a fee.<sup>5</sup> As before shown, the particular estate capable of supporting a remainder must be either a life estate or an estate tail. If it be a term of years, then, as before shown, the remainder is only a so-called remainder. Bracton, who wrote in the reign of Henry III., shows that limitations were made having what we would now call the form of a remainder expectant upon a fee simple conditional;<sup>6</sup> and an immense

<sup>1</sup> Butler's note, Co. Litt. 373 b.

<sup>2</sup> 1 Sheppard's Touchstone (by Preston), 182, 183.

<sup>3</sup> Butler's note, Co. Litt. 373 b.

<sup>4</sup> Anon., 12 Mod. 512; 1 Sheppard's Touchstone (by Preston), 22, 192, note.

<sup>5</sup> Willion v. Berkley, Plowd. 223, 235, 239, 242, 248, 252; Co. Litt. 327 a; Coke's 2d Inst. 336; Gray on Perp. § 14 and note; 1 Powell on Devises, 180; 2 Preston on Estates, 318, citing ch. 8, pp. 319, 320 and note, 343, ch. 8, pp. 323, 338, 342, 347-351, 353, 354; 1 Preston on Estates, 485, 486.

<sup>6</sup> Bracton, Book 2, ch. 6, 18 b, 17 a, ch. 31, 68 b, 69 a. See also Fleta, who wrote after the Statute De Donis (2 Preston on Estates, 327); Fleta, Book 3, ch. 9, § 9; 2 Preston on Estates, 327; Gray on Perp. § 14, note.

amount of discussion has arisen as to whether Bracton must not have been mistaken, because it is said that there never could have been a remainder limited upon a fee, and that the fee simple conditional is a fee. The forms which Bracton gives are like this:<sup>1</sup> A limitation by a father to his eldest son and the heirs of his body, and then to go over to a younger son and the heirs of his body. Of course in Bracton's remote day, that historical development of the estate which we now know as the remainder had not occurred. But the question is whether Bracton may not have been mistaken. We think the weight of both reason and authority is, that Bracton is right. It must be remembered that when Bracton wrote, the fee simple conditional probably had not become fully established; for the period, as before shown, to which its full establishment is to be referred is early in the reign of Edward I. It was not till then that the reversionary right could be cut off upon the birth of issue; so that the reversionary right was really what we would now call a reversion; and it did not become a possibility of reverter until the power was given by the courts to pass a fee simple absolute upon birth of issue. Now, upon the full establishment of the fee simple conditional, it certainly became a fee; and the notion is abhorrent, to one versed in the common law, that a remainder can be limited upon a fee. Professor Maitland replies to Mr. Challis,<sup>2</sup> who says that while a formedon in reverter is found in those early days, a formedon in remainder is not found in those early days. He replies<sup>3</sup> that chancery was free to invent new writs, and that if a search should be made, very likely a formedon in remainder would be found. Professor Maitland is of the opinion that Bracton is correct.<sup>4</sup>

But the estate tail which was the creature of *De Donis*, takes a remainder and takes a reversion; and the ability ages

<sup>1</sup> See the citations of Bracton in note 6, page 111, above.

<sup>2</sup> Challis, R. P. 64, 65.

<sup>3</sup> Professor Maitland, in 6 *Law Quart. Rev.* 25.

<sup>4</sup> Professor Maitland, in 6 *Law Quart. Rev.* 22.

ago acquired under Taltarum's Case has not changed the character of these interests expectant upon the estate tail. What would once have been a vested remainder expectant upon an estate tail still continues to be a vested remainder. But we may technically regard it as that kind of a vested remainder which is defeasible upon a condition subsequent, because it may be defeated by the common recovery suffered by the tenant in tail.<sup>1</sup>

<sup>1</sup> Gray on Perp. § 111; Cornish on Remainders, 132. The estate tail exists in Massachusetts and the statutes of that State contain much of practical value respecting the estate tail. The Massachusetts statutes provide that a tenant in tail may by a deed in common form cut off the estate tail, and all remainders and reversions expectant thereon; in other words that he may create by his deed a fee simple absolute. A mere quitclaim deed is enough for this purpose. An execution creditor of the tenant in tail or the purchaser at the execution sale as the case may be, takes a fee simple absolute in the land. But a remainderman in tail cannot cut off the estate tail and remainders and the reversion, unless the tenant for life of the particular estate joins in the deed; and a remainder in tail cannot be taken for the debts of its owner. This is peculiar, because the statutes expressly provide that estates tail in possession may be taken for the debts of the tenant in tail, and that the execution creditor shall get a fee simple in the land. The statutes extend the application of these principles as to barring the estate tail to equitable estates tail. A very important thing to be noted is that a tenant in tail cannot under the statutes, any more than he can at common law, pass an estate in the land by his will. It should be observed that in all the methods which we have sketched touching alienation by a tenant in tail, we have never suggested that he could alienate by his will.

Why is it that a remainderman in tail must, under the Massachusetts statute, get the tenant for life of the particular estate to join with him in the deed? It is because the statutes have followed the rule of the common law. The common recovery, which, under Taltarum's Case, became the method of clearing away everything by way of rights of issue and rights of persons having limitations over and the reversion, requires, at common law, to have the tenant in possession of the life estate a party to the action. Indeed the action must be brought against him as tenant to the *præcipe*. Now the deed in common form has, in Massachusetts under the statute, taken the place of the common recovery; and the statutes require the joining in the deed of the tenant for life. See this common-law principle which is embodied in the statute stated in *Holland v. Cruft*, 3 Gray, 184, 185; *Mass. Rev. Laws*, ch. 127, §§ 24-27; ch. 134, § 3; ch. 178, § 2; ch. 135, § 1. *Allen v. Trustees of Ashley*, etc., 102 Mass. 265; *Nightingale v. Burrill*, 15 Pick. 110.

Sometimes the gift is to the heirs of the body of A. In this case they take as purchasers; but the descent of the estate among them is the same as if A, the ancestor, had been given the estate tail.<sup>1</sup> There are some curious cases of estates tail, where the law is less favorable to heirs taking as purchasers, than though they took by descent. We will not spare the time for these illustrations, which will be found in the footnote.<sup>2</sup>

The next estate which we shall consider is the tenancy in tail after possibility of issue extinct. It is just what its title imports. It must be a case of tail special: One form would be to A and the heirs of his body on his wife B begotten or to be begotten. Suppose this wife to die, A surviving, and no issue of that marriage surviving, or if issue survive, that it becomes extinct during A's lifetime; A is now tenant in tail after possibility of issue extinct. During the wife's lifetime, he was a tenant in tail special and had an estate of inheritance; for even if there had been no issue of the marriage, there might thereafter be issue of the marriage. But upon the possibility of issue becoming extinct, he ceases to be a tenant in tail, the owner of an estate of inheritance.<sup>3</sup> Suppose, how-

<sup>1</sup> 1 Wash. R. P. 74; 1 Smith's Real & Per. Prop. 160; 1 Preston on Estates, 280, 281.

<sup>2</sup> These are cases of gifts in tail male or in tail female. Thus, if there be a gift to A and the heirs female of his body, the heir female takes by descent, and it is immaterial that, at the death of A, her brother as well as herself, be living. But if the gift be to the heirs female of the body of A, the daughter of A must take, if at all, as a purchaser, and if her brother and she survive A, the gift to her fails as she cannot predicate heirship; for her brother and not she is the heir of A. 4 Kent's Com. 213, note. And so if there be a gift to A and the heirs male of his body, and at his death, a granddaughter, the child of his eldest son, deceased, be living, the next younger son who survives his father will be entitled, although the heir of A is the granddaughter. But if the gift be to the heirs male of the body of A, the younger son in such a case must take, if at all, as a purchaser, and the gift fails because he cannot predicate heirship of A. *Roe d. Dodson v. Grew*, Wilmot's notes, 279, 280.

<sup>3</sup> Co. Litt. 28 a; 2 Black. Com. 124; 1 Wash. R. P. 75, 83; 2 Preston on Estates, 414.



ever, we have a case of tail general; the law considers, however old A may be, whether a woman or a man, that the party may have issue, so that the tenancy in tail after possibility of issue extinct is necessarily a case of the tail special.<sup>1</sup>

A tenant in tail after possibility of issue extinct has an estate which, for practical purposes, is regarded substantially as merely a life estate. He cannot defeat vested remainders or the reversion. On the contrary, a feoffment, fine, or common recovery by such a tenant operates as a disseisin of the remainderman or reversioner, entitling him immediately to enter, — just as is the case of such a conveyance by a tenant for life, as we have heretofore shown when treating of the subject of implied conditions or conditions in law.<sup>2</sup>

If there be a remainder in fee simple limited expectant upon an estate tail special, and the particular estate become a tenancy in tail after possibility of issue extinct, the particular estate, having practically the value of a life estate merely, will merge in the greater estate in remainder; and so if the tenant becomes the owner of the remainder or the reversion, the small estate will merge in the greater.<sup>3</sup> It is, however, quite the contrary with the estate tail. It never merges in a remainder in fee simple limited to the tenant in tail, and should the tenant in tail at any time come to own the remainder or the reversion his estate tail is preserved.<sup>4</sup> This is to conform to the great policy of De Donis to preserve the estate tail, and notwithstanding the many vicissitudes through which the estate tail has passed in so many centuries, as above sketched,

<sup>1</sup> 2 Black. Com. 124, 125. But, where property is given to a person who will be entitled to the whole of it unless a certain woman has a child, the court of chancery has, in some cases, ordered the property to be paid over, on being satisfied, from the age of the woman, that she cannot bear a child. *In re White* (1901), 1 Ch. 570.

<sup>2</sup> Doctor and Student, Dialogue 2, ch. 1; Co. Litt. 28 a; 1 Greenleaf, Cruise, 136; Williams, R. P. 53; 1 Wash. R. P. 83; 1 Preston on Conv. 144.

<sup>3</sup> See the authorities in note 2, above.

<sup>4</sup> 2 Black. Com. 178; Van Grutten v. Foxwell (1897), App. Cas. 679.

even to-day this purpose of De Donis is still the law, for a merger will not be permitted.

Equity, however, very often prevents a merger where it will work an injury, and avoids the technical effect of the common-law principle under which, two estates coming into the same person, the lesser will be merged in the greater.

We have already shown that in a deed the word "heirs" is required in the creation of an estate of inheritance, and that in a will the word "heirs" is often dispensed with; and so in a deed the word "heirs" is required in the creation of an estate tail, because it is an estate of inheritance.<sup>1</sup> We shall later show, under more complicated conditions of the law of Real Property, that in a deed, the word "body" or its equivalent, is required in the creation of an estate tail, and that in a deed the words "heirs male" will confer a fee simple, and that the word "male" is rejected as surplusage. It will also later appear that in a will such words are capable of creating an estate tail.<sup>2</sup> Even in a deed a conveyance at the common law to A, followed by a provision that if he die without heirs of his body, the land shall revert or shall remain over, confers a good estate tail. Here we find the words "heirs" and "body" to be present.<sup>3</sup> The peculiarity is that it is an estate

<sup>1</sup> If the word "heir" (singular number) be used in a deed, as, to A and his heir, A has only an estate for life; although it seems that "heir" (singular number) may be construed as *nomen collectivum*, even in a deed, and operate as the word in the plural would do. Tudor's Lead. Cases (3d ed.), 717. See further, Challis R. P. (2d ed.) 195 and note. Even in a deed in the following peculiar case, the word "heir" (singular number) may be sufficient to create an estate tail. This case is given by Coke in Co. Litt., 20 a and b, 22 a: This was a conveyance "to a man and to his wife, and to one heir of their bodies lawfully begotten, and to one heir of the body of that heir only." Tudor's Lead. Cases (3d ed.), 750.

<sup>2</sup> A devise to A and such heirs of her body or children as she shall leave living at her death, was held to be an estate tail. *Boyd v. Weber*, 44 Atl. Rep. 1078 (Penn.). In a will, a limitation of real estate to A and his heirs male, gives an estate tail. *Crumpe v. Crumpe* (1900), App. Cases, 127.

<sup>3</sup> Perkins' Profitable Book, § 173; 2 Preston on Estates, 474, 475, 486, 487.

tail by implication, and estates tail by implication are usually not found except in conveyances under the Statute of Uses and in wills.

There is hardly a rule of law but what has some exceptions; and there are exceptions to the rule requiring that in a deed the word "heirs" must be used to confer an estate of inheritance. Illustrations are the ancient estate of frank marriage,<sup>1</sup> and the ancient estate of frank almoign.<sup>2</sup> For a practical illustration, a conveyance in a deed to trustees is a good one. The word "heirs" may be omitted, and yet the trustees may take a fee; and the word "heirs" may be present and yet the trustees may not take a fee. Whether they take a fee or not depends upon the intention of the grantor as discovered from the meaning of the deed.

<sup>1</sup> 2 Black. Com. 115.

<sup>2</sup> 2 Black. Com. 101 *et seq.*

## CHAPTER XI.

COMMON-LAW DESCENT AND COMPUTATION OF DEGREES  
OF COLLATERAL RELATIONSHIP.

BOTH the fee simple and the estate tail descend at the common law by primogeniture. Under primogeniture the earlier born is preferred, and the descent is thence down in that one's line, and males are preferred to females. Thus land descends to the eldest son and down in his line, to the exclusion of his brothers and sisters.

In the case of the estate tail when the issue has become extinct, the estate tail has run out, and the estate will revert, unless the estate tail has previously been barred. But the fee simple, being limited to heirs general will go over to collaterals, if and when the issue is extinct. Now in a certain sense the estate tail may pass to collaterals, but they must be collaterals of the last tenant in tail, and not collaterals of the first taker. In a limitation to A and his heirs the estate will go by descent over to the collateral heirs of A after all of A's issue is extinct. But in a limitation to A, and the heirs of his body the estate can never pass to the collateral heirs of A; and yet some descendant of A which descendant is the latest tenant in tail, may die without issue and yet the estate tail may pass to his collaterals, if they be the heirs of the body, that is, descendants of A, the first taker.<sup>1</sup>

<sup>1</sup> *Riggs v. Sally*, 15 Me. 413; *Wright v. Thayer*, 1 Gray, 284; *Parker v. Parker*, 5 Met. 139; *Holland v. Cruft*, 3 Gray, 162, 182, 187; *Collamore v. Collamore*, 158 Mass. 74; *Perry v. Cline*, 12 Cush. 127; *Hawley v. Northampton*, 8 Mass. 38; *Corbin v. Healey*, 20 Pick. 514; *Wheatland v. Dodge*, 10 Met. 502; 2 Black. Com. 187, 188, 208, 209, 213, 214, 218, 219, 227, 228, 232, note, 233; 2 *Preston on Estates*, 375, 398, 399; *Tudor's*

Suppose an estate in fee simple or an estate tail to descend to three daughters of the last tenant, whom we will call A, B, and C. This presupposes that the ancestor has left no son, nor the issue of a son. Therefore the daughters take as heir. They are called "parceners" or "co-parceners," because at common law without the aid of statute they had the right to have partition made of the land.<sup>1</sup> They take as one heir and are called the heir.<sup>2</sup> It is not material whether these three women die before their father or later. As long as land, inherited from one or more of several females who take as co-parceners, continues united in possession, the tenants, whether males or females, are co-parceners.<sup>3</sup> Suppose A to die and to leave two sons, B to leave two daughters, and C to leave a son and a daughter; and if you please, the son to be younger than his sister. A's third part will pass wholly to her elder son, B's third part to her two daughters, each one taking one-sixth of the whole land, and C's third part will descend to her son wholly.<sup>4</sup>

The principle of *possessio fratris facit sororem esse hæredem* applies to the descent of the fee simple in possession at the common law, and its exclusive application is in the matter of the half-blood. It is known in the books, by way of abbreviation, as the doctrine of *possessio fratris*. We will presently show why it has no application to the descent of the estate tail. A fee simple in possession, at the common law, descends to the heir of the person last actually seised. Suppose a tenant in fee simple in possession to die, leaving a son and a daughter by his first wife, and a son by a second wife, the heir is the elder son. Now in order to make himself a

Lead. Cases (3d ed.), 728-740, 755, 880; Watkins on Descents, 64-80, 110; "History of a Title," Amer. Law Rev. October, 1875 (article by Uriel H. Crocker).

<sup>1</sup> 1 Leake, 64.

<sup>2</sup> Tudor's Lead. Cases (3d ed.), 880.

<sup>3</sup> 2 Black. Com. 188.

<sup>4</sup> 2 Black. Com. 219.

new stock of descent he must enter. Should he die without entry he is not the person last actually seised. The land then will descend, not to his heir as such, but to the heir of his father, who was the person last actually seised. Should this elder son die leaving issue, that issue would take, not because it is his heir, but because it is the heir of his father. Should he enter and die the issue would of course take as his heir; so that this matter of the half-blood would not come into operation should he die leaving issue. Suppose him to die without leaving issue, and having entered, he has made himself a new stock of descent. He is the person last actually seised, and his sister will be his heir. The half-blood can never inherit. The books express it forcibly, that the land shall escheat, rather. This is *possessio fratris*. The possession or actual seisin of the brother has made his sister his heir. Here a female is preferred to a male, because she is the heir. Should this elder son die without issue and without having entered, there is no *possessio fratris*. The son by the second wife takes as the heir of his father.<sup>1</sup> If, however, a tenant for years be in possession at the death of the ancestor, no entry by the elder son is required, for the possession of the land by the termor is regarded as the possession of the heir, sufficient to make the heir the person last actually seised.<sup>2</sup> The principle of the half-blood does not apply to females. Women of the half-blood may take together as co-parceners.<sup>3</sup>

The reason why the doctrine of *possessio fratris* has no application to the descent of the estate tail, is because no person can make himself a new stock of descent. The simplest form of the estate tail is to A and the heirs of his body. We therefore inquire at each successive step in the descent of the estate tail, who is now the heir of the body of A. And to take the case above put, if it were an estate tail, and the

<sup>1</sup> 2 Black. Com. 223, 227, 228.

<sup>2</sup> Tudor's Lead. Cases (3d ed.), 730.

<sup>3</sup> 2 Black. Com. 232, note.

elder son should die leaving issue, that issue would evidently be the person entitled as heir in tail. But should the elder son die without leaving issue, his sister could not be the heir, but her younger brother of the half-blood would be the heir; and this would be true whether these children be the children of the first taker, or whether the original tenant in tail was generations older than themselves; for if their father was an heir in tail, as the heir of some earlier first taker, they must likewise be in the same position, for the purposes of descent, as if their father were the first taker.<sup>1</sup>

Descent by right of representation is this: A man is seised of land in fee simple and dies, or he is a tenant in tail and dies. He leaves a granddaughter who is the child of his deceased eldest son, and he leaves a younger son. The granddaughter is his heir. She takes by right of representation, representing her father; and the younger son is excluded. Thus, under primogeniture, the land goes down in the line of the eldest son, whether he be dead at the time it descends or not.<sup>2</sup>

The doctrine of *possessio fratris* is abolished in England by modern statute,<sup>3</sup> and the mode of descent has been considerably altered by statute; but primogeniture still obtains in England, both in the descent of the fee simple and in the descent of the estate tail.

Although primogeniture is still the law in England, yet in certain portions of that country other customs of descent obtain, being derived from the Saxon period. The custom of gavelkind, obtaining in the county of Kent in England, is an old Saxon custom, which persists to-day in that county. It is the common law of that county. The descent is to the males in equal shares, and in the absence of males, to females in

<sup>1</sup> Williams on Seisin, 65, 66; Williams, R. P. 59, 104, 105.

<sup>2</sup> 2 Black. Com. 208, 213, 214, 218, 219; Williams, R. P. 59, 104, 105; Williams on Seisin, 59.

<sup>3</sup> 3 & 4 William IV. ch. 106; Williams on Seisin, 75, 76. See further, Tudor's Lead. Cases (3d ed.), 728-740.

equal shares, the issue of a deceased heir taking that one's share. It was held in *In re Chenoweth*<sup>1</sup> that the method of gavelkind descent extends to collaterals in every degree, and is not confined to brothers and their issue or nearer relations. In other words, the land does not begin to descend by primogeniture, there being collaterals in however remote a degree.

In this country there is no *possessio fratriſ*, but the statutes of the different states are very varied as to the right of the half-blood to inherit. The present condition of the Massachusetts statutes<sup>2</sup> is that kindred of the half-blood inherit equally with those of the whole blood in the same degree; and this will require to be noticed in respect to the word "degree" when we come to consider presently the method of computation of degrees of collateral relationship. There is no primogeniture in the United States in the descent of the fee simple. The children all take equally, and there is no preference of males to females. But the estate tail in such states as Massachusetts and Maine descends as at common law, and therefore by primogeniture.<sup>3</sup> In some of the states in which the estate tail still exists, the method of its descent has been modified by statute.<sup>4</sup>

At common law land can never descend by ascending lineally.<sup>5</sup> It is otherwise in the United States, for a man's father may be his heir, and so may his mother.

There are two methods of computation of degrees of collateral relationship. It is important to have some understanding of this subject in order to comprehend the statutes of the

<sup>1</sup> *In re Chenoweth*, Ward v. Dwelley (1902), 2 Ch. 488.

<sup>2</sup> Mass. Rev. Laws, ch. 134, § 2.

<sup>3</sup> *Riggs v. Sally*, 15 Me. 413; *Wright v. Thayer*, 1 Gray, 284; *Parker v. Parker*, 5 Met. 139; *Holland v. Cruft*, 3 Gray, 162, 182, 187; *Collamore v. Collamore*, 158 Mass. 74; *Perry v. Cline*, 12 Cush. 127; *Hawley v. Northampton*, 8 Mass. 38; *Corbin v. Healey*, 20 Pick. 514; *Wheatland v. Dodge*, 10 Met. 502.

<sup>4</sup> 1 Shars. & Budd, 111-114; *Horton v. Upham*, 43 Atl. Rep. 492 (Conn.); *St. John v. Dame*, 34 Atl. Rep. 110 (Conn.).

<sup>5</sup> 2 Black. Com. 208.



different states which relate to the descent of real estate. For instance, we have just alluded to the Massachusetts statute which provides that kindred of the half-blood shall inherit equally with those of the whole blood in the same degree. The mode of computing these degrees is either according to the common law, which is the canon law, or else it is according to the civil law or Roman law. The civil-law method for the purposes of descent applies in most of the states of this country,<sup>1</sup> and is the method in vogue in Massachusetts.

First, as to the method according to the common law or canon law: Suppose we wish to find in what degree of relationship A, the *propositus*, stands to a collateral relative of his. Find the common ancestor. Count from him the number of degrees or generations to the collateral relative. Start again from the common ancestor and count down to A. If the lines be of unequal length reject the shorter line. Thus, as between A and his uncle, the common ancestor is A's grandfather. Count from him to the uncle who is the son of the grandfather, and that is one degree, or generation. Count from the grandfather to A; here are two generations, A's father, one, and A himself, two. Rejecting the shorter line A stands to his uncle in the second degree. A's cousin is the child of A's uncle, and the lines are equal, and A and his cousin stand in the second degree, the same that A and his uncle do. A and his nephew are, of course, in the second degree because it is the same thing as just explained, the case of the nephew and uncle over again. Here the common ancestor is A's father, who is the grandfather of A's nephew. A and his brother are in the first degree, the common ancestor being their father.<sup>2</sup> But, notwithstanding this common-law method of computing degrees, it is a prin-

<sup>1</sup> 4 Kent's Com. 413.

<sup>2</sup> 4 Kent's Com. 413; 2 Black. Com. 206.

ciple of the common law that those claiming under a nearer ancestor shall be preferred in inheriting to those who claim through a more remote ancestor; and A's nephew and those derived from him will be preferred for this reason to A's uncle. This is the same as saying that the inheritance goes to those derived from a relative who was in the nearer degree. Thus, to a nephew rather than to an uncle, as the nephew is derived from a brother who stood in the first degree, the nearer degree.<sup>1</sup>

The civil-law method is very simple. Start from A and count round to the collateral relative: Thus, A's father, one, A's grandfather, two, A's uncle, three. A and his uncle are in the third degree; A and his cousin are in the fourth degree; A and his brother are in the second degree.<sup>2</sup>

<sup>1</sup> 2 Black. Com. 224-227.

<sup>2</sup> 4 Kent's Com. 413; 2 Black. Com. 206. In *Sturgeon v. Husted*, 46 Atl. Rep. 377 (Penn.) it was held that a great-grandfather is entitled to take by descent in preference to great-uncles, and great-aunts; the computation of degrees being by the civil law, and the great-grandfather being one degree nearer than these others.

## CHAPTER XII.

## USES.

WE think the time has now come to introduce to the reader the subject of Uses. We have had but little occasion in our previous chapters to speak of Uses; but they played such an immense part in the constitutional and legal history of England, and are embedded so profoundly in the law of the various states of this country, that it is well at this point to introduce the reader to some acquaintance with the law which concerns them. The law of Uses lies at the foundation of the entire modern law of trusts. Moreover, limitations are in common use in this country which involve the presence of a use. But the subject is so large a one, that it is not convenient, at this time, to develop it beyond a certain point; so that we shall postpone a considerable part of our treatment of the subject until after we have discussed the subject of the executory devise.

A use is the equitable estate in land which a court of equity protected and recognized before the Statute of Uses, and to some extent since the Statute of Uses. To put it simply, an owner of land, say, in fee simple, would make a feoffment to A and his heirs, reserving to himself, the feoffor, the beneficial ownership of the land. He might, also, if he chose, make a feoffment to A and his heirs to the use of B and his heirs. In the one case, the feoffor would have the use; in the other case B would have the use. But the legal title has in each case been completely transferred to the feoffee by the transaction. The only court that could protect the *cestui que use* was the court of equity, the Court of Chancery.

The first appearance of uses in England has generally been referred by the writers to a period toward the close of the reign of Edward III.<sup>1</sup> But Professor Maitland has shown by late researches that they can be found in an earlier reign.<sup>2</sup>

A man would make a feoffment, for instance, in fee simple to a large number of feoffees, reserving the use of the land to himself and his heirs. As these feoffees would be joint tenants, and as they would die off, the technical, legal title, would pass to the survivors, and new feoffments would be made, so that the lord found it very difficult to get his escheat, and the profits of his seignory. These feoffees would ordinarily be merely nominal parties, the feoffments being made of course for the simple purpose of getting rid of the technical legal title.<sup>3</sup>

As to the origin and prevalence of uses in England, these may be ascribed to three main purposes. First, by the common law lands were undevisable; but naturally, there was a disposition to devise lands, and one of the purposes for limiting lands to uses was to acquire the power of making a will of the property. If, then, a man conveyed the land to feoffees to uses, he could make a will of his property rights, which was his use.<sup>4</sup> The second main ground was the feudal burdens, which the land owners of England tried to shake off. If a man divested himself of his technical legal title, reserving the use, his property right, which was the use, was not subject to feudal burdens. The technical legal title would be in the feoffee. The feudal burdens were chiefly these: First, prosecutions for treason, particularly of great lords, were not uncommon in the early days in England. The penalties were threefold, the hanging of the offender, the forfeiture of his lands, the corruption of his blood. The first two really belonged to the political law, but the corrup-

<sup>1</sup> 1 Sanders on Uses (5th ed.), 10-12.

<sup>2</sup> 8 Harv. Law Rev. 127, 136.

<sup>3</sup> Tudor's Lead. Cases (3d ed.), 339; 1 Gray's Cases on Prop. 467.

<sup>4</sup> 1 Law Quart. Rev. 164 and note 1.

tion of blood was feudal; and this corruption of blood was that the issue of the offender, not only could not inherit the land forfeited to the Crown, but could never inherit land from anybody else. We have explained this matter in a recent chapter. Now if a man owned nothing but a use there would be no forfeiture and no corruption of blood.<sup>1</sup> Secondly, among the feudal burdens, we will mention aids.<sup>2</sup> A vassal holding by knight service could be taxed for an aid, which was (1) to get the lord out of prison, if he got into prison, (2) to make his eldest son a knight, (3) to endow his daughter upon her marriage.<sup>3</sup> Thirdly, among the feudal burdens, we will mention reliefs.<sup>4</sup> A relief was a tax paid by the heir to the lord in the case of tenure by knight service upon the death of the ancestor, that is to say, upon the heir's inheriting the fee.<sup>5</sup> Fourthly, escheats are mentioned among the feudal burdens;<sup>6</sup> and in this connection we understand escheats to mean forfeiture for treason or for felony. We have in a recent chapter explained this matter very fully. Fifthly and sixthly, wardship and marriage are mentioned among the feudal burdens.<sup>7</sup> These were the most profitable fruits of tenure, and obtained in tenure by knight service. They were innovations upon the feudal system in England, and therefore were not brought over with the Conquest from the continent. The subject of wardship we have explained fully in a recent chapter. As to marriage, it was at first confined to infant female wards, but afterwards was extended to infant male wards. Marriage was the right of the lord to find a partner in marriage for the infant heir; and should he or she decline the

<sup>1</sup> 1 Gray's Cases on Prop. 467 *et seq.*, citing 1 Spence, Eq. Jur. 445; Preamble to Statute of Uses.

<sup>2</sup> See the authorities in note 1, above.

<sup>3</sup> 2 Black. Com. 63, 64; 1 Pollock & Maitland, 298, 299, 330; 1 Hallam's Middle Ages (Boston ed. 1861), 177, 178.

<sup>4</sup> See the authorities in note 1, above.

<sup>5</sup> Sullivan's Law Lectures, 257, 258, 268.

<sup>6</sup> See the authorities in note 1, above.

<sup>7</sup> See the authorities in note 1, above.

proposed partner in marriage, the lord would exact a large fine.<sup>1</sup> So much for feudal burdens.

The third main reason for the prevalence of uses was the Statutes of Mortmain, of which there was quite a series, and which had at an early date undertaken to prevent the conveyance of land to the Church, because it took it out of the track of commerce, so to speak. It was not very likely that the Church would ever alienate it, and therefore it would lie in mortmain, that is, dead hand; and so a gift of land to the Church was practically *in perpetuum*.<sup>2</sup> Indeed, one of the potent causes of the French Revolution was the fact that so large a part of the land of France had accumulated through the ages in the Church, where it lay free from taxation and conferred an immense power upon the clergy. The clergy did a great deal more than the laity in developing the system of uses, for they could evade the Statutes of Mortmain by getting the gifts to be made to feoffees to the use of the Church, thus giving the Church the real or beneficial ownership of the land, while the mere technical legal title would reside in the feoffee or feoffees.<sup>3</sup>

As a general thing the feoffor to uses retained the possession of his land and had its profits as much as though he had retained the legal ownership.<sup>4</sup>

As to the putting the land into the hands of feoffees to uses, it appears to what a very large degree this was done for the purpose of devising the owner's property, for so late as down to the end of the reign of Henry VI. nearly all the cases of feoffments to uses found in the Calendars of Proceedings in Chancery are for the purpose of making a will. The feoffor would make his feoffment, reserving the use of the land for himself for his life, and the feoffees were to make

<sup>1</sup> 1 Hallam's Middle Ages (Boston ed. 1861), 178, 179; 2 Hallam's Middle Ages (Boston ed. 1861), 282, 297.

<sup>2</sup> 2 Wash. R. P. 91-94.

<sup>3</sup> 2 Wash. R. P. 91-94.

<sup>4</sup> 1 Law Quart. Rev. 167.

such conveyance after the feoffor's death as he should direct by his will.<sup>1</sup>

As already pointed out, it was the Court of Chancery to which the *cestui que use* must have resort as against the feoffee to uses. But no record is found of any action by the Court of Chancery earlier than the reign of Henry V.<sup>2</sup> The records of the Chancery Court in England in the early centuries are very meagre.<sup>3</sup> The English have a splendid set of law reports in their Year Books, but these are of common-law cases. Spence, in his "Equitable Jurisdiction," a book of great authority, thinks that the clergy early had resort to chancery, but that they were checked in this respect in the reign of Richard II. by a statute, which was designed to prevent the evasion of the Statutes of Mortmain.<sup>4</sup> Blackstone and most of the writers of the text-books tell us that John de Waltham, who was the Bishop of Salisbury in the reign of Richard II., invented the writ of subpœna for the purpose of calling feoffees to uses to account in the Court of Chancery;<sup>5</sup> but late researches have caused the writers to conclude that this is a mistake; and it is now confidently asserted that John de Waltham did not invent the writ of subpœna.<sup>6</sup> Curiously, however, a few years ago, in 1897, the Selden Society of England made a find. They found a record of a bill in equity brought in the reign of Richard II. by a *cestui que use*, calling feoffees to uses to account.<sup>7</sup> Professor Ames, of the Harvard Law School, very sagaciously has pointed out in the Harvard Law Review that there is no evidence of any decree being

<sup>1</sup> 1 Law Quart. Rev. 164 and note 1.

<sup>2</sup> 1 Spence, Eq. Jur. 443.

<sup>3</sup> 1 Spence, Eq. Jur. 443; Digby, R. P. 246.

<sup>4</sup> 1 Spence, Eq. Jur. 443.

<sup>5</sup> 3 Black. Com. 51.

<sup>6</sup> Digby, R. P. 248; 8 Harv. Law Rev. 257; Judge Oliver Wendell Holmes, in 1 Law Quart. Rev. 162.

<sup>7</sup> Vol. 10, Publications of the Selden Society, pages 48, 69, 95, 114, 122, 129 *et seq.*, 415.

entered in that case;<sup>1</sup> so that we are left with this result, that we have no record of any action taken by the Court of Chancery in applications by *cestuis que use* against feoffees to uses before the reign of Henry V.<sup>2</sup>

So very convenient did the land owners find uses that Blackstone tells us that at the time of the Statute of Uses (27 Henry VIII.), almost all the land of England had been conveyed to uses.<sup>3</sup>

The causes which led up to the Statute of Uses are numerous, and the preamble to that statute enumerates a good many. There was a statute passed in the reign of Richard III. (1 Richard III. ch. 1), which conferred upon the *cestui que use* the power to make a legal conveyance of the land. The statute was intended for the benefit of purchasers by giving the *cestui que use* an alienable power over the possession; but the feoffees and *cestuis que use* often colluded, and by making secret and different feoffments, purposely defeated each other's alienation. One of the great evils sought to be remedied by the Statute of Uses was this matter of fraud on purchasers. The Statute of Uses caused the Statute of Richard III. to become wholly inoperative.<sup>4</sup> The preamble to the Statute of Uses recites among other evils to be remedied, frauds upon purchasers, the passing of real estate in the form of a use by will, the loss to the lords of their escheats, aids, reliefs, wardship, and marriage, and the depriving the king and lords of their escheats by way of forfeiture.

A jointure signifies a joint estate limited to both husband and wife, but its common meaning is an estate limited to the

<sup>1</sup> Professor Ames, 11 Harv. Law Rev. 133, 134.

<sup>2</sup> Equitable jurisdiction in England began with the Council, and by degrees shifted to the Chancellor, and it had not become exclusive in the Chancellor till probably toward the end of the fifteenth century. Vol. 10, Publications of the Selden Society, p. xlv.

<sup>3</sup> 2 Black. Com. 137.

<sup>4</sup> Gilbert on Uses (Sugden's ed.), 27, 34, note; 1 Sanders on Uses (5th ed.), 21, 22.



wife only, in real estate, for her life at least, to take effect immediately upon the death of the husband.<sup>1</sup> Before the Statute of Uses a jointure, whether settled upon the wife before or after the marriage, could not bar her dower estate in lands of which the husband was seised during coverture.<sup>2</sup> But the prospective husband could convey to feoffees to the husband's use to prevent dower.<sup>3</sup> And before the Statute of Uses it was a common thing to take an estate from the feoffees who were seised to the husband's use, to him and his wife, either before or after marriage, for their lives or in tail, for a competent provision for the wife after her husband's death.<sup>4</sup> There was neither dower nor curtesy in a use.<sup>5</sup> Inasmuch as lands had been settled to a large extent by way of jointure before the Statute of Uses, and inasmuch as the conversion of the use into a legal estate by the Statute of Uses would have made wives dowable of lands which had been owned by the husband by way of use, the Statute of Uses expressly provided that there should not be dower in lands upon which the statute operated, provided that there had been a settlement by way of jointure before marriage.<sup>6</sup> It is one of the complaints contained in the preamble to the Statute of Uses that by the operation of a use husbands are deprived of their curtesy and wives of their dower. After the Statute of Uses dower was not allowed in an equitable estate; and in an earlier chapter we have shown that this has been very largely changed by statute. The reason given by the courts is that it had become very common to limit equitable estates in lands for the purpose of avoiding dower.<sup>7</sup> But after the Statute

<sup>1</sup> 2 Black. Com. 137.

<sup>2</sup> *Vernon's Case*, 4 Coke's Rep. 1 b; 1 Wash. R. P. 262; *McCaulley's Exrs. v. McCaulley*, 7 Houston's Rep. 124 (Del.).

<sup>3</sup> *Wilmot's Notes*, 187, 188. See further, 1 Atkinson on Conveyancing, 262; *Tudor's Lead. Cas.* (3d ed.) 75.

<sup>4</sup> *Vernon's Case*, 4 Coke's Rep. 1 b.

<sup>5</sup> 4 Kent's Com. 30; 1 Wash. R. P. 161; 2 Wash. R. P. 106.

<sup>6</sup> 2 Black. Com. 137.

<sup>7</sup> 1 Wash. R. P. 160-162; *Reed v. Whitney*, 7 Gray, 536.

of Uses curtesy was allowed in equitable estates, and this continues to be the law to this day.<sup>1</sup>

The Statute of Uses (27 Henry VIII. ch. 10) made a mighty change in the law of uses. It provided that the seisin, or legal estate, should be transferred to and united with the use. Thus, if the owner of land in fee simple make a feoffment to A and his heirs to the use of the feoffor and his heirs, the transaction comes to nothing, for the seisin which passes to A is instantly seized upon by the statute and united with the use in the feoffor, so that the feoffor has under the Statute of Uses the legal fee simple, the equitable estate being blotted out by the statute.<sup>2</sup> A man makes a feoffment to A and his heirs to the use of B and his heirs. The statute takes the seisin which is in A and unites it with the use in B. Now B has the actual seisin, although he has not entered and was not present at the feoffment.<sup>3</sup>

The effect of the Statute of Uses was to render lands undevisable, because the equitable estate or use which always had been devisable had become converted by the statute into a legal estate; and the common law did not recognize any validity in a devise of lands. This proved, however, very unsatisfactory, and in 32 Henry VIII., five years after the Statute of Uses, the first Statute of Wills was passed; and in successive years several other Statutes of Wills were passed. Under the Statute of Wills, all socage lands became devisable, and two-thirds of all lands held by knight service. In the reign of Charles II. knight service tenure was abolished, and all freehold lands in England came to be held by socage tenure, so that from that time all freehold lands in England became devisable.<sup>4</sup> But, of course, we are speaking of owners in fee simple.

<sup>1</sup> 1 Wash. R. P. 160-162; *Reed v. Whitney*, 7 Gray, 536.

<sup>2</sup> Williams, R. P. 158.

<sup>3</sup> *Cushing v. Spalding*, 164 Mass. 287; *Sullivan v. Chambers*, 31 Atl. Rep. 167 (R. I.).

<sup>4</sup> Tudor's Lead. Cas. (3d ed.) 352.

Before the Statute of Uses, there were two transactions in use among the land owners of England which were mere contracts, the bargain and sale, and the covenant to stand seised. The bargain and sale was upon pecuniary consideration. The consideration of the covenant to stand seised was blood or marriage. Suppose a man owning land agreed for a pecuniary consideration to stand seised of it for the benefit of the party who was to pay the money, or who had paid the money; this raised a use in favor of that party. The one who agreed to hold the land for the other's benefit was the bargainor, the other the bargainee. Equity, that is, chancery, would compel the bargainor to stand by his bargain, and thus hold him as a trustee for the other. Suppose that the consideration were blood or marriage, and that one should covenant or make an agreement to stand seised to the use of another; equity would hold him a trustee for the *cestui que use*. Now, the Statute of Uses, as was always the case with it, as before shown, carried the seisin along and united it with the use, so that after the statute the seisin of the bargainor was transferred to the use in the *cestui que use*, that is, the use in the bargainee. And the bargain and sale came to operate as a favorite form of conveying the legal estate in land.<sup>1</sup> And so in the case of the covenant to stand seised, the legal estate, the seisin, was transferred by the statute to the *cestui que use*. This became a form of conveying the legal estate in lands.<sup>2</sup> Both of these conveyances are in use to-day in Massachusetts; and we have in Massachusetts several cases of deeds held to be covenants to stand seised, some of them decided within a few years.

It is beyond dispute if there were a feoffment, fine, or common recovery, with the declaration of a use, that the declaration of the use was not required to be put into writing until the Statute of Frauds. As to the bargain and sale of a free-

<sup>1</sup> Butlers' note to Fearn on Rems. 416; *In re Hollis Hospital* (1899), 2 Ch. 548.

<sup>2</sup> Butler's note to Fearn on Rems. 416.

hold estate, the Statute of Enrolments, passed very shortly after the Statute of Uses, required that the transaction should be by deed of indenture and enrolled in the public record office. The question is: How about the agreement to stand seised? If it were by way of covenant, of course there would be a deed, for a covenant is a deed, that is, an instrument under seal. Our own opinion is that an agreement to stand seised did not require to be put into writing until the Statute of Frauds. We have discussed this subject in an article contained in 7 Harvard Law Review, 464, a considerable portion of which is presented in the note at the end of this chapter; and we think that the reader will find his interest in the subject of uses somewhat enhanced by a perusal of this note, and his conception enlarged by perceiving the nature of the expressions used by the lawyers of England when the Statute of Uses was recent.

We have said several times that, at common law, lands were not devisable, and this is the invariable statement of the books. But among the Saxons of England lands were devisable, and this ability to devise lands persisted for a considerable time after the Conquest.<sup>1</sup> The ancient will was frequently a gift *inter vivos*, reserving a life estate to the grantor, whom we must call the testator.<sup>2</sup> The courts changed the law allowing a will of lands, and probably for the reason that it was perilous to allow a man on his death-bed to do so great a thing as to give away his land;<sup>3</sup> but, as above stated, ancient wills were frequently conveyances of land. And here it may be interesting to point out the historical changes in the theory of English law. In *Callard v. Callard*, decided in the reign of Elizabeth, and which is fully considered in the article by the author contained in the note at the end of this chapter, a father, being seised in fee of certain land, in con-

<sup>1</sup> 2 Pollock & Maitland, 313, 321-327.

<sup>2</sup> 2 Pollock & Maitland, 315 *et seq.*

<sup>3</sup> 2 Pollock & Maitland, 326.

sideration of the marriage of Eustace his eldest son, said these words, being upon the land: "Eustace, stand forth. I do here, reserving an estate for my own and my wife's life, give thee these my lands, and Barton to thee and thy heirs." It was held on appeal that this was a void conveyance. But then again we have seen a few pages back how that, through the instrumentality of uses, a conveyance of land could be made with the intention that the grantee should dispose of it after the grantor's lifetime as he should order. Here, then, we perceive what different conceptions arose from time to time under the English law concerning the right to make dispositions of land to take effect after the owner's death.

As to the raising of a use in incorporeal hereditaments, these were usually, as already shown, created and conveyed by deed of grant; and to raise a use in these the declaration of the use would be in the deed of grant.<sup>1</sup> Thus, in the case of a rent. An annuity is an incorporeal hereditament or right.<sup>2</sup> An annuity is a yearly sum stipulated to be paid to another in fee or for life or for years. It is chargeable upon the person of the grantor, and therein is distinguishable from a rent charge, which is chargeable upon the land.<sup>3</sup> Except that it may be limited to a man and his heirs, it bears none of the incidents of real estate.<sup>4</sup> It cannot be limited to uses, and therefore, the Statute of Uses cannot operate. And the Statute of Uses does not operate upon copyhold estates.<sup>5</sup>

Rents are expressly mentioned in the Statute of Uses. Since the Statute of Uses a rent cannot be created by bargain and sale. It was otherwise before the Statute of Uses. The reason why the rent cannot be created by bargain and sale is that there is no seisin of the rent on the part of the

<sup>1</sup> Gilbert on Uses, 270, 271.

<sup>2</sup> 2 Black. Com. 40, note.

<sup>3</sup> 3 Kent's Com. 460.

<sup>4</sup> 2 Black. Com. 40, note.

<sup>5</sup> *In re Townsend's Contract* (1895), 1 Ch. 720.

bargainor upon which the Statute of Uses can act.<sup>1</sup> But a rent may be created by way of use by a deed of grant. Sanders gives as the reason, that the land is the seisin out of which the rent arises. But the editor of the 5th edition of Sanders on Uses, says that this cannot be a sound reason, for that it would apply equally well to a bargain and sale, and that the better reason is that the grant is a common-law assurance, that by it the rent is created, and that there is therefore something *in esse* for the limitation of uses, which is subsequent to the grant, though contained in the same instrument, to act upon.<sup>2</sup> But upon a conveyance of land by bargain and sale a rent may be reserved; and Sugden says that this is permissible because of that clause of the Statute of Uses which executes rents when any person is seised of land to the intent that another may have a rent.<sup>3</sup>

Before and since the Statute of Uses, uses are divided into active and passive.<sup>4</sup> Active uses, or trusts, are around us on every side, and the law of uses is the foundation of the great modern system of trusts. An active trust is one in which the trustee is given some duty to perform. Thus, a conveyance to A and his heirs to the use of or in trust for B and his heirs, A to keep the premises insured, make repairs, pay the taxes, and pay over the net profits of the land to the *cestui que trust*. Now the Statute of Uses never executes an active trust so long as it remains active. B has the equitable estate.<sup>5</sup> But suppose it be to A and his heirs to the use of or in trust for B and his heirs, and there be nothing more; the Statute

<sup>1</sup> Bacon's Abr., title "Bargain and Sale, B"; Gilbert on Uses (by Sugden), 85, 86, 281.

<sup>2</sup> 1 Sanders on Uses (5th ed.), 106.

<sup>3</sup> Gilbert on Uses (by Sugden), 86, note 4.

<sup>4</sup> Tied. R. P. § 468.

<sup>5</sup> Merrill v. Brown, 12 Pick. 220 *et seq.*; Dakin v. Savage, 172 Mass. 23; Ure v. Ure, 56 N. E. Rep. 1087 (Ill.). In Pennsylvania in order to constitute an active trust, the duty to be performed by the trustee must involve some discretion upon his part. *In re Eshbach's Estate*, 46 Atl. Rep. 907 (Penn.).

of Uses instantaneously passes the seisin from A and transfers it to B. In this latter case it is called a passive trust or passive use. But if there be an active trust for the benefit of A for life and upon his death to the use of B in fee, then, upon the death of A, the Statute of Uses executes the use in B, the subject-matter being land.<sup>1</sup> The Statute of Uses will not operate if the trustees are to be divested of the legal estate by making a conveyance of it, after the purposes of the trust have been fulfilled, to the *cestui que trust* or to the assigns of the *cestui que trust*. In *Dakin v. Savage*,<sup>2</sup> there was a conveyance to trustees of real estate, and the trust was an active one. The Court drew the inference that the purposes of the trust were to be fulfilled upon the discharge of a certain mortgage. After the discharge of the mortgage the trustees with the assent of the *cestui que trust* conveyed the land to some third party in fee, and the question was whether the Statute of Uses, the purposes of the trust having been fulfilled, had not divested them of their legal estate by transferring the seisin to the *cestui que trust*. If so, the deed of the trustees was nugatory. The court drew the inference that it was the intention of the deed of trust that the trust should continue until the trustees should convey to the *cestui que trust* or assigns, therefore that the Statute of Uses had not deprived the trustees of the legal estate. Hence, the deed of the trustees was effectual, and had conveyed the legal estate.

An active trust, as already shown, is not executed by the

<sup>1</sup> *Morgan v. Moore*, 3 Gray, 319; Crocker's Notes on Common Forms (3d ed.), 187; *In re Frost*, 43 Ch. Div. 251; Tudor's Lead. Cas. (3d ed.), 358; *Numsen v. Lyon*, 39 Atl. Rep. 533 (Md.); *Hopkins v. Kent*, 40 N. E. Rep. 4 (N. Y.). But if there be an active trust for the benefit of A and his heirs and the trustee die, and A die, the legal fee descends to the heirs of the trustee, and the Statute of Uses does not execute the trust in the heirs of A. *Harlow v. Cowdrey*, 109 Mass. 184.

<sup>2</sup> *Dakin v. Savage*, 172 Mass. 23. See further, Perry on Trusts, § 305 and cases there cited; *Pennock v. Lyons*, 118 Mass. 92, 93; *Lawrence v. Lawrence*, 54 N. E. Rep. 919 (Ill.); *Fearne on Rems.* 123-148; 2 Shars. & Budd, 292.

Statute of Uses so long as the purposes of the trust are not fulfilled. A passive trust is executed by the Statute of Uses; but there is a great exception in the case of married women. Thus, to A and his heirs to the use of or in trust for B and her heirs. If B be a married woman, the Statute of Uses will not act so long as the marriage state continues. But upon the death of her husband, she surviving, the Statute of Uses will immediately execute the use, that is, transfer to her the legal estate from the trustee.<sup>1</sup>

We now come to the celebrated topic of a use upon a use, for there cannot be a use upon a use. This was held in *Tyrrel's Case*<sup>2</sup> very shortly after the Statute of Uses. It was a bargain and sale of a freehold estate; thus, a bargain and

<sup>1</sup> *Parker v. Converse*, 5 Gray, 336; *Meacham v. Bunting*, 21 N. E. Rep. 175 (Ill.); *Moore v. Stinson*, 144 Mass. 594; *Cushing v. Spalding*, 164 Mass. 287; *Richardson v. Stodder*, 100 Mass. 528.

<sup>2</sup> *Tyrrel's Case*, Dyer, 155 a. There are three theories upon which to account for the rule that there cannot be a use upon a use. One of these theories is that the rule depends upon the language of the Statute of Uses. This theory is given by Lord Bacon in his "Reading upon the Statute of Uses." The statute provides that it shall act when one is seised of lands, etc., or other hereditaments. And by way of illustration, in a limitation to A and his heirs, to the use of B and his heirs, to the use of C and his heirs, B is not seised of lands or hereditaments. He has but a use, and of a use there can be no seisin so that the statute cannot carry the seisin to C. Lord Bacon's Reading upon the Statute of Uses, 36 (ed. 1642).

Another theory is that of Professor Ames of the Harvard Law School and is adopted by Mr. Williams in the 18th edition of *Williams on Real Property*. The theory is that the rule that there cannot be a use upon a use is an old chancery doctrine, older than the Statute of Uses. Thus, if there be a bargain and sale to A and his heirs to the use of the bargainor, or, if there be a bargain and sale to A and his heirs to the use of B and his heirs, the theory is, inasmuch as a bargain and sale implies a use in the bargainee, and further requires the payment of the consideration by him, that chancery probably would not, before the Statute of Uses, have sustained the second use, A paying the consideration. Professor Ames in 4 *Green Bag*, 81; *Williams, R. P.* (18th ed.) 173.

Another theory is that of Mr. Digby, in *Digby, R. P.* 371 (5th ed.), that a use of lands involved a mystery, which may have been comprehended by the lawyers of the period of the Statute of Uses, but which is obscure to, and unfathomable by us.



sale to A and his heirs to the use of B and his heirs. Of course, the bargain and sale to A raised a use in him, and it was held that the use limited to B could not be executed by the Statute of Uses, the principle being announced that there cannot be a use upon a use. Later, courts of equity came to uphold this second use as an equitable estate. But the decision in Tyrrel's Case, just mentioned, was at law. Spence tells us that a form was contrived after the Statute of Uses to evade the Statute of Uses: Thus, to A and his heirs, to the use of B and his heirs, to the use of C and his heirs.<sup>1</sup> Here we get precisely the result that we get in Tyrrel's Case. The use limited to C is a second use, and the estate of C therefore cannot be executed by the statute.

The Statute of Uses was intended by its framers to root up uses and destroy them; but its effect has been to establish uses upon a stronger foundation than they ever had had. This principle that there cannot be a use upon a use puts it into the power of any grantor or testator to get completely around the Statute of Uses by creating what it was hoped the statute had destroyed, an equitable estate in land.

We have invented the term "initial seisin." The "initial seisin" we define as the seisin of the creator of the estate, as distinguished from the seisin of the estate as found in the person to whom the statute has passed it. It is only the "initial seisin" which the statute acts upon. Thus, a feoffment to A and his heirs, to the use of B and his heirs, to the use of C and his heirs. The "initial seisin" passes from the feoffor by the feoffment to A, and is there taken up by the statute and transferred to B. As found in B it is no longer the "initial seisin." Therefore the statute cannot act upon it, and the seisin is not carried over to C. The estate of C is equitable, and is protected only by the Court of Chancery. We do not mean by the term "initial seisin" that there are two seisins of the estate, but only that we regard the seisin from two points

<sup>1</sup> 1 Spence, Eq. Jur. 490.

of view. The expression "initial seisin" is simply valuable, if at all, as a convenient expression.

In a feoffment to A and his heirs, to the use of B and his heirs, to the use of C and his heirs, the estate of C is equitable. In a bargain and sale to A and his heirs, to the use of B and his heirs, the estate of B is equitable. In a feoffment to A and his heirs, to the use of A and his heirs, to the use of B and his heirs, or more briefly stated, in a feoffment to the use of A and his heirs, to the use of B and his heirs, the estate of B is equitable. In each of these cases, we have a double use, and the second use is not executed by the statute, but is sustained in a court of equity. In the case of the bargain and sale next above mentioned, the "initial seisin" is in the bargainor, grantor, and is transferred by the statute to A. It can be carried by the statute no farther. In the feoffment to the use of A and his heirs, to the use of B and his heirs, the "initial seisin" is in the grantor and is transferred by the statute to A. It can be carried by the statute no farther.

If there be a feoffment to the use of A and his heirs, to the use of B and his heirs, by the overwhelming weight of authority A takes under the Statute of Uses, and not at common law; and there is no dispute whatever that the estate of B is an equitable estate because it is the case of a double use.<sup>1</sup> It is true that there are some cases in the reports which we shall consider at a later time in which this first use has been disregarded by the courts; but the rule of law is indisputable as here stated. When, then, the books tell us that there cannot be a use upon a use, what really is meant is, that the second use is not a legal estate.

Wills of real estate derive their efficacy from the Statute of Wills (32 Hen. VIII. ch. 5). Of course, both in England

<sup>1</sup> Sugden on Powers (8th ed.), 10, 140-146; *Jefferson v. Morton*, 2 Saunders' Rep. 11, note 17; *Williams*, R. P. 161; *Tied. R. P.* § 464. *Contra*: 1 Leake, 120.

and in the United States there are more modern statutes of wills than the old Statute of Wills of Henry VIII. ; but that is the basic statute, the foundation of them all. The Statute of Uses operates in a will of real estate, and with a corresponding result to what above appears.<sup>1</sup> Therefore, if there be a devise of real estate to A and his heirs, to the use of B and his heirs, to the use of C and his heirs, the estate of C is equitable; and if there be a devise of real estate to the use of A and his heirs, to the use of B and his heirs, the estate of B is equitable.<sup>2</sup>

But while there cannot be a use upon a use as above explained, yet any number of successive uses may be limited, and frequently are limited. For example, take the ordinary case of a remainder limited by way of use. This, of course, is not a true remainder because it takes effect not at common law but under the Statute of Uses; but we invariably call it a remainder: Feoffment to A and his heirs, to the use of B for life, and after the death of B to the use of C and his heirs; these uses are not one upon the other, but are one after the other. They are successive, and limitations over in the form of uses are very common, whether as remainders, so-called, or as other forms of limitations over.

If there be a limitation to A to the use of or in trust for B and his heirs, the Statute of Uses executes the use, and B has but a life estate, because the estate of the grantee, A, is but a life estate.<sup>3</sup> And, conversely, if there be a limitation to A and his heirs to the use of or in trust for B, the Statute of Uses executes the use, and B has but a life estate.<sup>4</sup>

<sup>1</sup> 1 Leake, 122.

<sup>2</sup> 2 Wash. R. P. 138; *Merrill v. Brown*, 12 Pick. 220; 2 *Jarman on Wills* (5th ed.), 289; 1 Leake, 122.

<sup>3</sup> *First Baptist Soc. v. Hazen*, 100 Mass. 322.

<sup>4</sup> *McElroy v. McElroy*, 113 Mass. 509.

## NOTE.

WAS AN ORAL AGREEMENT TO STAND SEISED GOOD BEFORE THE  
STATUTE OF FRAUDS?

That the declaration of a use before the Statute of Frauds need not have been in writing if there was a common-law conveyance, as by feoffment, fine, or recovery, appears to be clear (see Shepp. Touchstone (by Preston), 519); and in 27 Hen. VIII. 8 b, the same year in which the Statute of Uses was enacted, there is a discourse upon uses, in which it is said that the land cannot pass without livery, but the use may by bare words.<sup>1</sup> It is asserted by Mr. Washburn (see 2 Wash. R. P. 127-129, 99, 100), and by Mr. Tiedeman (Tiedeman, R. P., 2d ed., § 783), that an oral agreement to stand seized was good before the Statute of Frauds; but neither of these authors cites adequate authority for the proposition. It is, of course, to be understood that a technical covenant must have been under seal; and we think that the following discussion will show that the answer which we shall give to the question at the head of this article will depend upon what force and meaning we shall attach to the well-known case of *Callard v. Callard*. The transaction in *Callard v. Callard*, Cro. Eliz. 344 (Queen's Bench), was as follows: A father being seised in fee of certain land, in consideration of a marriage of Eustace, his eldest son, said these words, being upon the land: "Eustace, stand forth. I do here, reserving an estate for my own and my wife's life, give thee these my lands, and Barton to thee and thy heirs." It was held that this was a good conveyance, but upon what grounds does not appear. This decision was reversed in the Exchequer Chamber, reported in Moore, 687. But it appears in the report of Moore that in the Queen's Bench (*supra*), Popham, C. J., held that the consideration of blood raised a use to Eustace without writing; but that the three other judges were of a contrary opinion, and that these latter regarded the transaction as a feoffment with livery, being upon the land; and that there was a use to the feoffor and his wife for life, and afterwards to Eustace and his heirs. In the Exchequer Chamber, out of seven judges, five regarded the transaction as not a good conveyance. The grounds

<sup>1</sup> See further, 1 Sanders on Uses (5th ed.), 14, 218; 1 Perry on Trusts, § 75; 2d Institute, 675, 676.

stated in this report (Moore) are that there was no feoffment executed, because the intent was repugnant to law, — that is, to pass an estate to Eustace, reserving a particular estate to himself and his wife; and that a use it could not be, because the purpose was not to raise a use without an estate executed, but by an estate executed which did not take effect; and this report states that they all agreed that if this were a use, yet it would not arise upon natural affection without a deed.

In the report of this case in Popham, 47 (there spelled Collard *v.* Collard), it was said by Gawdy, J., of the Queen's Bench (see pp. 47, 48), that "by a bare word an use cannot be raised, as appeareth in divers reports," citing Mich. 12 and 13 Eliz., which we take to be case of Page *v.* Moulton, cited *infra*. But then Gawdy, J., added (p. 48): "But to say generally that an use cannot be raised or charged upon a perfect contract by words upon good consideration cannot be law." And Gawdy, J., goes on to say (p. 48) that it is to be considered what was the law before the Statute of Uses; and that a use was raised before that statute by a grant of land for money, which is a bargain and sale, and that a grant of land made in consideration of the marriage of the grantor's child is as valuable as a grant of it for money, and more valuable, and that at the common law there was no difference between these; and that the use by the contract was transferred according to the bargain in each case; that because of the Statute of Enrolments, which requires a bargain and sale to be by deed indented and enrolled, it appears that before that statute the use would have been passed by bare words; that that statute applies to bargain and sale only; hence, that other cases are as they were before the Statute of Enrolments, and that the Statute of Uses has made no change in this particular. But Gawdy, J., repeats that every slight or accidental speech shall not be enough to raise a use; but that if upon a statement by a man of what he will give upon the marriage of his child, the marriage shall occur, and that in consideration thereof the young people shall have such land, and for such an estate, then a use shall be raised, and shall pass accordingly to the parties; and Fennor, J., agreed to this. Popham, C. J. (p. 49), also said that by Baynton's Case, 6 and 7 Eliz., it is admitted that a use was raised at common law by bargain and sale by parol; for otherwise to what purpose was the Statute of Enrolments? And that by the same case it is also admitted now to pass by parol upon a full agreement by words in

consideration of marriage or blood, etc.; that in that case it was also agreed that the consideration of nature is the most forcible consideration which can be, and that a bare covenant by writing without consideration will not change a use; therefore that the force is in the consideration. (See *infra*, Baynton's Case.) Fennor, J., said (same report, Popham, 47) that the words being spoken on the land amounted to a livery. Gawdy, J., said (p. 47), that the words amounted to a livery if they are sufficient to pass the estate; but that the words were not sufficient for that purpose, because his intent appeared that Eustace was not to have the land until after the deaths of the grantor and of his wife, and therefore were of the same effect as if he had granted the land to Eustace after his death; and that it cannot pass as a use, because by bare words a use cannot be raised, etc., as is above set forth in the extract from the opinion of Gawdy, J. Popham, C. J. (same report, p. 49), would seem to regard the words spoken as not to amount to a livery; and he said that "where land is to pass in possession by estate executed, two things are requisite, — the one the grant of the said land, the other the livery to be made thereupon;" for that the bare grant without livery is not enough. Clench, J., said (p. 49) that the transaction amounted to a grant and livery also; and that there was a use in the grantor and wife for their lives.

The report of this case in Popham, in the Queen's Bench, does not therefore agree with the report of what was considered in the Queen's Bench as appearing in Moore, 687 (*supra*), and which is above set forth; for the report in Popham does not make it appear that the three other judges than Popham, C. J., regarded the transaction as a feoffment to the use of the feoffor, etc., for life, and afterwards to Eustace and his heirs.

Gawdy, J., also on page 48 of this report (Popham), said that by an exception out of the Statute of Enrolments, London is as it was before that statute; and therefore that lands may pass there by bargain and sale by word without deed. Popham, C. J., also (on p. 49) made the same remark; and, says the report, to this all the justices agreed. Popham, C. J., cited in this Chibborne's Case, Easter, 6 Eliz., Dyer, 229 a, where it was held that such land may pass by bargain and sale by words only.<sup>1</sup>

Lord Bacon shows that the mere letter of the Statute of Uses does not prove that an agreement to stand seised may be raised

<sup>1</sup> See also 2d Institute, 675, 676.

by parol.<sup>1</sup> But the arguments of Gawdy, J., and of Popham, C. J., in *Callard v. Callard* (*supra*), do not rest at all upon any phrases of the Statute of Uses, but upon the facts in their arguments mentioned.

In *Corben's Case*, Moore, 544, the father, in consideration of marriage, agreed by parol to stand seised of the land to the use of himself for his life, and afterwards to the use of his son and his heirs. The question was whether this was good. In the Queen's Bench there was a contrariety of opinion among the judges, and it was adjourned to the Exchequer Chamber; and this report says that there it is still pending. This case appears after *Callard v. Callard* in the Queen's Bench. It does not appear at what time *Corben's Case* was adjourned to the Exchequer Chamber; but the decision in the Exchequer Chamber in *Callard v. Callard* was later than the appearance of *Corben's Case* in the Queen's Bench. For aught that appears, it may have been brought to the Exchequer Chamber after the decision of the Exchequer Chamber in *Callard v. Callard*.

*Callard v. Callard*, as abbreviated in 2 Rolle, Abr. 788 (see *infra*, where this is referred to), is followed by a statement referring to *Corben's Case* (*Corbyn and Corbyn*).<sup>2</sup>

It appears in 2 Rolle, Abr. 784, pl. 4, giving *Corbyn's Case* (*Corbyn and Corbyn*), that it was held at Michaelmas 37 and 38 Eliz. in the Queen's Bench, that if a man, in consideration of a marriage to be had between B, his son, and A, covenant to stand seised to the use of B and A, this is a good consideration to raise a use to A. The report of this case in Moore (*supra*) gives the date as Hilary, 36 Eliz. But this statement of Rolle differs as to two beneficiaries instead of one, as is seen by comparison with the above report in Moore; and it does not make any reference to a parol agreement, nor to any future use after the death of the grantor. The question, however, of a future use does not enter into the question here sought to be solved; nor, if the points be identical, is the matter of the number of beneficiaries pertinent to our inquiry.

<sup>1</sup> Bacon's Reading upon the Statute of Uses (London ed. 1806), pp. 45, 46, and note 78. on page 137.

<sup>2</sup> The copy in the Social Law Library in Boston is torn, so that it does not appear what that statement is; but it would appear to be that the word torn is the word "contra," and the reference is to *Corbyn and Corbyn*, 37, 38 Eliz., Queen's Bench.

In Dyer, in a note to Page *v.* Moulton (discussed *infra*), p. 296 b, note, it is said as to Corbin *v.* Corbin, citing 2 Rolle, Abr. 784, pl. 4 (*supra*), and Moore, 544 (*supra*), that the point that a use may be created without deed, upon consideration of natural affection, was not determined; but that it was held by three justices that this is good. This note in Dyer is doubtless error; and the reference is to the three justices in Callard *v.* Callard, as is seen in the report of that case in Popham, 47, above set forth.

As the matter stands as thus far discussed, there does not appear to have been any actual adjudication of the point whether, before the Statute of Frauds, an oral agreement to stand seised might not have been good. In Callard *v.* Callard, as reported in Moore (*supra*), five of the judges, a majority, in the Exchequer Chamber said that there was no feoffment for the reasons above quoted; and that it could not be a use, because the purpose was not to raise a use without an estate executed, but by an estate executed which did not take effect. This latter means, as we understand it, that there could not be a use because the purpose was not to raise a use without a feoffment with livery of seisin, but by a feoffment which did not take effect in possession. Popham, C. J., in the report of this case in Popham, on page 49, uses the same phrase, "estate executed;" and he says: "Where land is to pass in possession by estate executed, two things are requisite: the one the grant of the said land; the other, the livery to be made thereupon;" for that the bare grant without livery is not enough. Then the report in Moore adds to the foregoing: "And they all agreed that if this were a use, yet it would not arise upon natural affection without a deed." This last expression is a *dictum* merely; because the majority of the court has declared that the purpose was not to raise a future use by mere agreement. The decision in the Exchequer Chamber turns upon *the purpose of the parties* and *the nature of the transaction*, and does not lead to a conclusion that an oral agreement to stand seised of a future use might not, under other circumstances, have been good, or of a use presently to take effect. But even if that expression be regarded as an essential part of the decision, it may well enough follow from the view as to such *hypothetical* purpose of the parties, and *the nature of the transaction*, namely, that where the purpose is to raise a future use by a transaction directly with the *cestui que use*, there must be a deed. Here, in any view, the transaction was directly with Eustace. In the theory of the court it was not



the purpose to raise a future use in Eustace by mere agreement; but in the opinion of a majority of the court, it was the purpose to raise a present estate in him, with a reservation of an estate for the lives of the grantor and of his wife. It therefore would seem that the case does not lead to the conclusion that an oral agreement to stand seised of a future use might not, under other circumstances, have been good, or of a use presently to take effect.

In *Pitfield v. Pearce*, Trinity, 15th Charles, reported in March, 50, there was a deed. It was held that no estate passed, because it did not appear that it was the intention to raise a use; for that by the word "give" it was intended that the transaction should be by transmutation of possession. Twisden says (p. 50) that "in Callard and Callard's Case," "the better opinion was that in that case it did amount to a livery, being upon the land," and that there the word "give" was used. But Twisden did not agree that no estate passed in *Pitfield v. Pearce*. He laid stress upon the transaction being upon the land in *Callard v. Callard*; whereas in *Pitfield v. Pearce* it was not upon the land.

The case of *Callard v. Callard* in the Exchequer Chamber is also reported in 2 Anderson, 64, under the name of *Tallarde v. Tallarde*. This report, referring to the case in the Queen's Bench, says that some said it was a feoffment to the use of the feoffor and his wife during their lives, and afterward to the use of Eustace and his heirs; and some held that it was in the husband and wife by use raised in the husband and wife, and afterward to the use of Eustace and his heirs; and this in the Queen's Bench by the judges there. So, whichever way, Eustace had the fee after the death of the husband and wife; and upon this they gave judgment accordingly; upon which a writ of error was brought to the Exchequer Chamber, and the judgment was reversed, — Michaelmas, 38, 39 Eliz. And first they held that no use could be created by these words, nor words only. The words themselves do not so import, for there is not a word of use besides by the father; and his intent does not appear at all to create a use; and by his express words or intent shown, a use could not be created. This report then proceeds to state the case of *Page v. Moulton*, which is given *infra*; and then the report adds: Which case in effect as to a use is the case in question; but if by deed upon good consideration a covenant that another shall have the manor of D to him and his heirs, this makes a use now as was held M. 1 M., Dyer, fo. 96. The case here referred to is that of *Bainton, Peti-*

tioner *v. The Queen*, Mich., 1 Mary, which is given *infra*. This report, then, proceeds to set forth that they said it could not be a feoffment, because there were no words, and there was no intent to prove this feoffment nor livery, as this case is; for it appears by the words that he intended to have the estate to himself and his wife during their two lives, which could not be if he enfeoffed the son, etc.

To avoid repetition, we will not discuss this report in Anderson until later.

Spence says (1 Spence's Eq. Jur. 449), (even using the word "covenant"): "A man, it seems, might covenant to stand seised to an use without deed;" and in the note he says, "I have assumed that it was first settled that a deed was necessary by Collard *v. Collard*, 2 Rolle, Abr. 788," referring to his page 478; and he adds that "Lord Chief Baron Gilbert seems to have considered that a deed was always necessary to raise an use where the possession was not passed." For this reference to Gilbert, see *infra*. In note C to page 478, Spence says: "At first, parol declarations seem to have been admitted as constituting a covenant to stand seised; but in the reign of Mary it was decided that there must be a deed as indicative of a settled resolution, Collard *v. Collard*, 2 Rolle, Abr. 788." Collard *v. Callard* was decided in the reign of Elizabeth, as above. The statement of it in 2 Rolle, Abr. 788, cited by Spence (*supra*), is imperfect, as appears from the report of it. In 2 Rolle, Abr. 788, a very brief statement is made, and that only as touching a use raised upon natural affection by parol in the nature of a covenant. Spence, relying upon this brief statement, remarks as above; but as above appears, if the report in Moore be taken, this was a point which the court did not have occasion to decide. If the report in Anderson be taken, the statement therein must be read in connection with the context. It appears in that report that the words used in the transaction were not sufficient to raise a use. To this is added the statement, *which is superfluous*, "nor words only;" and then, that there was no intent to create a use; and that by his *express words* a use could not be created. The court, then, according to this report, likened the case to Page *v. Moulton* (stated *infra*); and see that case as understood by Gawdy, J. (referred to above). It does not, from either of these two reports, that of Moore and that of Anderson, appear that the Exchequer Chamber found as they did upon the general ground that a parol agreement to raise a use by standing

seised upon good consideration would fail, or that any general rule of law was established in a case of such peculiar facts, consisting, among other elements, of a transaction *upon the land*, had with the ulterior beneficiary himself, with an estate in possession to remain in the grantor. Finally, if there were no other reason, such diversities appear in the two reports of the case, that of Moore and that of Anderson, that there is no authentic evidence regarding the exact reasons.

The remark of Spence (*supra*), with reference to the reign of Mary, is based upon the following statement in 2 Rolle, Abr. 788 (above referred to), and cited by Spence. Rolle says, in his brief statement of Callard *v.* Callard above referred to, that it is there said (that is, in Callard *v.* Callard) that a case in 1 Mary was in accord. That case in 1 Mary is no doubt the case of Bainton Petitioner *v.* The Queen, Michaelmas, 1 Mary, and reported in Dyer, 96. This case is sometimes cited as Seimor's Case. This case is as follows: A, who was attainted, covenanted and granted by indenture to B (in consideration of land already conveyed by B to A, after the death of B) to levy a fine of land, to be assured to him, A, for life, remainder to B in tail. No fine was levied. Held, that no immediate use was raised, for then by no possibility could the covenant ever be performed, and that it is in the future tense; but the report proceeds to say that the court "agreed in a manner, that if I covenant, in consideration of marriage, or for a sum of money paid me, that the party shall have the said manor of D by express words, this shall change an use immediately, for there is no estate to be made. It was also agreed that if *cestui que use* wills that his feoffees should make estate to J. S. in tail or in fee, and die, the use changes before the estate be executed." See further this case cited and stated in Winch, 36. See further this case referred to in 3 Leonard, 75.

Page *v.* Moulton, decided in Michaelmas term, 12th and 13th Eliz., Dyer, 296 b, above referred to, was earlier than the decision of Callard *v.* Callard, in the Queen's Bench (*supra*). In Page *v.* Moulton, a father upon communication of marriage of his youngest son, promised the friends of the wife that after his death and the death of his own wife, the son should have the land to him and his heirs. The promise was by parol. The marriage took place; "and no consideration on the part of the woman." The report states: "By the opinion of all the four justices of the bench, without open argument, the use is not altered by such naked prom-

ise; and so adjudged in next Hilary term." The statement that it was "without open argument," may indicate that the case was only lightly considered.

The above expression, that of the alteration of the use, is a common expression in the old books; and other instances of it, or of the equivalent expression, that of the use changing, — meaning changing from the old owner of the legal estate to the new owner of the legal estate, — are to be found in this paper. It is to be explained in this way. Lord Bacon (see Lord Bacon's Reading upon the Statute of Uses, London ed., 1806, pp. 44, 45), speaking of the period of the Statute of Uses, says: "Now, at this time, uses were grown to such a familiarity, as men could not think of possession but in course of use; and so every man was seised to his own use as well as to the use of others." We have, just above, in *Bainton Petitioner v. The Queen*, a double use of the expression; in one of which it means a change of the legal estate, and in the other a change of the equitable estate; but very commonly it means a change of the legal estate. The above case of *Page v. Moulton* is cited in *Englefield's Case*, *Trinity*, 32 Eliz. Moore on p. 333, to the point that a use could not arise in the latter case because it was not alleged that the writing was sealed. The case of *Page v. Moulton* has been referred to more than once above; and it is the case which Gawdy, J., in *Callard v. Callard*, cites to show (as above) that a use cannot be raised by a bare word. Crompton (*Crompton's Jurisdiction of the Courts*, on p. 61) also states *Page v. Moulton*; and gives as reasons that it is a nude pact, because no consideration moves on the part of the woman, the agreement being by parol; but Crompton (*ib.*) adds: "But I collect that if any consideration had come on the part of the woman, the use would have been changed by this agreement, because there would have been a *quid pro quo*, although it was by parol;" and that Manwood, Chief Baron, said it was adjudged that, if a man said to his son and a woman whom he was to marry that in consideration of the same marriage they should have the same land to them in tail, this is good tail without deed or other circumstance. The son marries, as appears afterward. In a note to the report of *Page v. Moulton* in *Dyer* (as above), *Callard v. Callard* is cited, giving as the reports thereof, Moore, 688, and 2 Anderson, 64, and Popham, 47; and in this note it is said that in the Exchequer Chamber in the case of *Callard v. Callard* "by Clerk, Walmsley, Periam, and Anderson, upon a consideration of natural

affection an use may be created without deed, and no justices *contra*." This is the same note as that referred to above, in which there is manifest error.

Gilbert (see Gilbert on Uses, 270, 271) says that where the possession was passed, a use could be raised by word; and he further says: "So it seems a man could not covenant to stand seised to a use without a deed, there being no solemn act; but yet a bargain and sale by parol has raised a use without, and it has been held to do so since the statute, in cities exempted out of the statute." And see above Chibborne's Case. Gilbert also says (pp. 270, 271) that "where a deed was requisite to the passing of the estate itself, it seems it was requisite for the declaration of the uses, as upon a grant of a rent, or the like."

Duke on Charitable Uses, p. 136 (London ed. of 1805) says, speaking of the charitable uses under the statute of Elizabeth: "Where the things given may pass without deed, a charitable use may be averred by witnesses; but where the things cannot pass without a deed, there charitable uses cannot be averred without a deed proving the use." See further 1 Perry on Trusts, § 75.

(This Note consists of an article by the author published in 7 Harvard Law Review, 464. In order to save space we here omit a considerable portion thereof, some of which consists of *dicta* of the English courts.)

In conclusion it seems to us that the decision in *Callard v. Callard*, taken most strongly, went no further than to hold that the transaction in that case did not constitute an agreement to stand seised; that it was a transaction which amounted to nothing whatever, taking place on the land, and the grantor not passing the immediate possession, but reserving a present life estate, etc.; that it does not appear that the Exchequer Chamber found as they did, upon the general ground that a parol agreement to raise a use by standing seised upon good consideration would fail; that it has never been decided, in any case or class of cases, that under the Statute of Uses and the law of uses every agreement to stand seised must, of necessity, be by deed, — that is, that no agreement to stand seised is good without deed; that judicial legislation, which any such doctrine (as that such an agreement must be by deed) would be, is not to be inferred without clear adjudication; that the reports of *Callard v. Callard*, in the Exchequer Chamber, are on this point so diverse as to leave us without authentic evidence of the exact reasons; that the arguments of

Gawdy, J., and Popham, C. J., are unanswerable, and have not been met; that the *dicta* in the books based upon these reports of Callard *v.* Callard do not show us what Callard *v.* Callard decided in this particular, and are no stronger than the reports of Callard *v.* Callard themselves.

(Article by the author in 7 Harvard Law Review, 464.)

## CHAPTER XIII.

## THE CONTINGENT REMAINDER.

WE have had nothing to say up to this point about the contingent remainder; and in discussing the subject of the remainder in connection with the subjects of the reversion and the possibility of reverter, we mentioned one of the three great rules of the remainder. We will now mention the other two of these great rules, and it is in these connections that we will treat of the contingent remainder. We will first mention the rule that the remainder must arise immediately upon the expiration of the particular estate upon which it depends; and by this is meant that the remainder must take effect in possession immediately upon the expiration of all the preceding particular estates, or, if there be but one particular estate, upon the expiration of that estate. Thus, to A for years, remainder to B for life, remainder to C and the heirs of his body, remainder to D and his heirs. Each of these remainders must take effect in succession upon the expiration of the preceding estates. Thus, D cannot have the possession until A's interest has expired, until B is dead, and until C is dead without issue, or if he left issue, until that issue shall be extinct. Let us convert the vested remainder given D into a contingent remainder, for the purpose of drawing out fully the meaning of the rule of the remainder which we are considering.<sup>1</sup> But as a contingent remainder cannot be limited upon a term of years we will for convenience eliminate the limitation made to A for years, and we will introduce as the contingent element that D shall survive X, so that it will read, to B for his life, remainder to C and the heirs of his body,

<sup>1</sup> Smith's Essay, §§ 702, 757, 764, 765; Fearn on Rems. 8 (note).

remainder to D and his heirs, provided that D survive X. Now let the estate tail of C expire, B still living, and let X die, D surviving him; the contingent remainder has now become a vested remainder and will await the expiration of the life estate of B, and upon the death of B the remainder will take effect immediately in possession. Or let us suppose that B be dead and that C survive, or that C be dead but that his issue in tail survive, and now let X die, D surviving; just as before, we have a vested remainder which will take effect in possession upon the expiration of the estate tail. But now let us suppose that B be dead, and that the estate tail has run out, and that thereafter X dies, D surviving him. Now, surely, D has survived X, but the remainder fails, because of the rule we are considering, in that it was not able to arise, that is, to take effect in possession, immediately upon the expiration of the preceding estates. These preceding estates being for life and in tail serve as the particular estates to support the remainder.

The principle which we are considering that the remainder must arise immediately upon the expiration of the particular estate upon which it depends, has no application to equitable estates which have the form of the remainder.<sup>1</sup> If, then, there be a trust of real estate, and the trust be not made to cease upon the expiration of the particular estate, but covers also the remainder, so that the remainder is an equitable estate, this is often called an equitable remainder. This expression is not accurate, but is convenient, for no remainder can be an equitable estate. Now this equitable remainder is not subject to the rule we are considering, and is not defeated by its failure to arise upon the expiration of the particular estate. The reason is that the rule we are considering is a feudal rule which requires that when an estate of freehold is limited there shall always be a tenant to the *præcipe*. Therefore no gap or hiatus is permitted between the expiration of the particular

<sup>1</sup> Gray on Perp. §§ 116, 324, 325.



estate and the taking effect in possession of the remainder. But in the case of the limitation in trust the legal estate is in the trustees, and remains in them in the case we are considering. They have the actual seisin, and their legal estate fulfils all feudal necessities.<sup>1</sup> The next great rule of the remainder is that no remainder can ever abridge, derogate from, or cut short the particular estate. These three phrases all mean the same thing, but we introduce them as they are all three in common use. To illustrate these positions we take Mr. Fearne's celebrated illustration of the first of his four classes of contingent remainders, and since it is a perfectly trustworthy form, we use it occasionally in this book by which to test propositions. Although not a practical form, courts and writers take it as a perfectly secure test. It is this: To A till B returns from Rome, and after his return to C. Let us, for convenience, make the estate of C to be in fee. Now the estate of A is to cease upon the return of B from Rome, at which time the estate of C will take effect in possession. But this is a good remainder, because the estate of A is not cut short. The words, "till B returns from Rome," are words of limitation and not words of condition subsequent. The words of limitation mark the bounds of A's estate, and when the contingent event occurs, if ever, during A's lifetime, A's estate simply expires upon limitation. A's estate is a life estate. It certainly is not in tail or in fee, for there are no words of inheritance. It certainly is not for years, for there is no fixing of its duration in days, weeks, months, or years. It is, therefore, a life estate in A which may expire while he still lives. Now this remainder to C is a contingent remainder. It is a remainder, as just shown, because it cannot cut short the particular estate. It is a contingent remainder, because it is contingent whether it will arise upon the expiration of the particular estate; for even should B return from Rome he might do so after the death of A so that the remainder

<sup>1</sup> Jessel, M. R., in *Abbiss v. Burney*, 17 Ch. Div. 229.

would fail. Moreover it is a contingent remainder, because B may never return from Rome. Let us change the form above given, so that it shall read: "to A, provided that if B shall return from Rome, the estate shall then go to C and his heirs." Here we have words of condition, "provided that if," which are calculated to cut short the life estate of A upon the return of B from Rome. Evidently the estate of C is not a remainder. It is not good at common law, but is only valid under the latitude of the Statute of Uses and the Statute of Wills;<sup>1</sup> for limitations by way of use were never according to the common law. Here, then, we have a case where words of condition subsequent are not for the benefit of the grantor and his heirs, as would be the case at common law as before shown, but operate to the benefit of a third party, C. The estate of C is regarded as cutting short the estate of A upon the happening of the contingency during the lifetime of A; and the estate of C is called a conditional limitation. The expression "conditional limitation" is unfortunately used in real property books in several senses. But the sense in which it is here used is, on the whole, the best sense in which to use the expression.

The following are Fearne's celebrated four classes of contingent remainders:

1. When the remainder depends entirely on a contingent determination of the preceding estate itself. An illustration of this class is the old case of a limitation to A till B returns from Rome, and after the return of B, to C. The particular estate here is on limitation, and the language marks the original bounds of the estate of A; and turning to the definition, the remainder depends entirely on a contingent determination of the particular estate itself. It is perceived in the case of a life estate that it may come to an end during the life of its tenant.

<sup>1</sup> 2 Wash. R. P. 224, 226, 238, 255, 256, 286, 288, 344; Smith's Essay, §§ 148-158, 195.

2. The second class is expressed in these words: when some uncertain event, unconnected with and collateral to the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder. This class is sharply contrasted with the first class. Here, the contingent element is unconnected with and collateral to the determination of the particular estate; and the contingent event must occur before the remainder can take effect. Illustrations are: to A for life, remainder to B for life, and if B die before A, remainder to C for life; also, to A in tail, and if B come to Westminster Hall such a day, to B in fee.

3. The third class is expressed thus: when a remainder is limited to take effect upon an event, which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate. An illustration is: to A for life, and after the death of B, remainder to C. The time of the death of B is the contingency; but that B must die some time or other is certain; but the death may not occur until after the termination of the particular estate. If it should turn out so, the contingent remainder falls through and fails to take effect. Under this class, there can only come cases in which the event is certain to occur, and therefore, practically speaking, the event must always be the death of somebody or other. In the other two classes the event might never happen.

4. The fourth class is thus expressed: when a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made. This sweeps in a very large class of cases. It includes remainders to the heirs of living persons; and so a remainder limited to the first son of B, who has no son then born, comes under this class; and a limitation to two persons for life, remainder to the survivor in fee.<sup>1</sup>

It is a maxim of the law that no one can be the heir of

<sup>1</sup> Fearne on Rems. 5 *et seq.*

a living person. It is expressed in these words: *nemo est haeres viventis*. An exception may be here mentioned to the principle of this rule; and that is when, by special designation in a will, there is a limitation to the heirs of a person *in esse*, expressed thus: to the heirs of the body of A now living. If this be limited as a remainder, it is a vested remainder. Here the word "heirs" is used in a popular sense to denote the individual who is the apparent or presumptive heir of the ancestor, and such person, being both in being and ascertained, has a vested remainder.<sup>1</sup>

The first class has been already distinguished above from the conditional limitation, according as words of condition are or are not present; but under the other three classes, words of condition may be freely used without necessarily making a limitation to be a conditional limitation. For illustration, take the case in the second class, of a limitation to A in tail, and if B come to Westminster Hall such a day, to B in fee; that does not mean that upon B's coming to Westminster Hall on that day, the possession of the estate is to be immediately transferred to him, which would make it a conditional limitation; but it means that on the occurrence of the event, his estate is to become a vested one, that is, a vested remainder, to take effect upon the natural expiration of the particular estate in tail.<sup>2</sup>

We have above said that a contingent remainder cannot be limited upon a term of years. But there is an exception to this rule of law in case the contingent event, if it shall occur, must in all probability precede the expiration of the term. Thus, if there be a limitation to A for eighty years, if B shall so long live, remainder over, after the death of B, to C and his heirs, the remainder is a vested remainder, because it is practically certain that B will not live eighty years. But if the

<sup>1</sup> Fearne on Rems. 209-215, and note a, on p. 209. That a remainder to "the next of kin" of one living is a vested remainder in them, see Sharswood, J., in *McCullough v. Fenton*, 65 Penn. St. 425.

<sup>2</sup> Fearne on Rems. 263.

term were a short one, so that B would be very likely to outlive the duration of the term, it would be a contingent remainder, provided that contingent remainders could be limited upon terms of years. Suppose B to die after the expiration of the short term, the contingent remainder would fail. It is true that the remainder is limited to take effect upon the death of B; but B has outlived what would be the particular estate, so that the remainder was not ready to arise immediately upon the determination of the particular estate. It would, therefore, be a contingent remainder, because it is contingent upon the death of B, before the expiration of the term, and is a void limitation, because a contingent remainder cannot be limited upon a term of years. But if the term be a long one, as above, the remainder is good as a so-called vested remainder expectant upon a term of years.<sup>1</sup> But if, though the term be a long one, yet the remainder is otherwise contingent, as being limited to a person who was not ascertained, the remainder will be bad.<sup>2</sup> In these cases of contingent remainders limited upon terms of years, we are assuming that the limitations are according to the common law, because, as we shall later see, the limitation would not nowadays be held to be a contingent remainder if limited in a will, and whether it would be so held nowadays in a limitation to uses is an open question.

If there be a limitation of a particular estate with a remainder over, and a common-law condition subsequent be annexed, now if the remainder be not limited independently of the condition subsequent, then upon a breach of the condition and an entry therefor, the remainder is destroyed.<sup>3</sup>

<sup>1</sup> *Napper v. Saunders*, Hutton's Rep. 118; *Countess of Darbie's Case*, cited in *Littleton's Rep.* 370; *C. J. Hale*, in *Weale v. Lower*, Pollexfen, 67; 4 *Kent's Com.* 209; 2 *Greenleaf's Cruise*, 206-208, 243, 250, and note 1.

<sup>2</sup> *Doe v. Morgan*, 3 Term Rep. 763; 2 *Greenleaf's Cruise* (in vol. 1), 250, note 1.

<sup>3</sup> 1 *Leake*, 230, 231; *Challis*, R. P. (2d ed.) 72.

But if the remainder be limited independently of the condition subsequent, the condition is repugnant and void.<sup>1</sup>

There are various tests by which to distinguish a vested from a contingent remainder. We will mention several, and we think we shall find that none of them are perfectly satisfactory, because none of them will cover all the well-considered cases. For practical purposes they do very well, but a definition ought to be complete.

First, as to Blackstone's celebrated definition, which is of the contingent remainder. Some of the others are of the vested remainder, but since one is exclusive of the other, it is not material whether the definition be of the one or of the other. Blackstone's definition of a contingent remainder is that, a contingent remainder is one that is limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event, so that the particular estate may chance to be determined, and the remainder never take effect.<sup>2</sup> Blackstone, in the above definition, says the particular estate may chance to be determined, etc. Much force could be given to this clause of the definition. It fits in very prettily with the above form: to A till B returns from Rome, etc. A may die, B may thereafter return from Rome. The contingent event has occurred yet the remainder has failed, for the particular estate has chanced to determine, and the remainder can never take effect. But Blackstone himself evidently lays no stress upon this word "chance," because his own illustration is to A for life, and in case B survives him, then with remainder to B in fee.<sup>3</sup> Here the danger to the contingent remainder is not that A's estate may chance to determine, but on the contrary that it may endure too long; in other words, that A may outlive B. That part of Blackstone's definition relating to dubious and uncertain per-

<sup>1</sup> Challis, R. P. (2d ed.) 72.

<sup>2</sup> 2 Black. Com. 169, 170.

<sup>3</sup> 2 Black. Com. 170.

sons, is perfectly satisfactory; but we shall see that often a remainder may be upon a dubious and uncertain event and yet not necessarily be a contingent remainder; for it may be a vested remainder defeasible upon a condition subsequent. Thus it is perfectly settled that in the case of a limitation to A, with power in him or in another person to appoint to whom the estate shall go after his death, and in default of appointment, to B and his heirs, the remainder to B and his heirs is a vested remainder, defeasible upon a condition subsequent,<sup>1</sup> yet here it is limited evidently upon a dubious and uncertain event, and we shall later find other cases coming under the same principle, that is to say, classified as vested remainders, defeasible upon a condition subsequent.

Another test is this; here it is the vested remainder which is defined. The present capacity, it is said, of taking effect in possession, if the possession were now to become vacant, distinguishes a vested remainder from a contingent remainder.<sup>2</sup> We think that in the case of the limitation to A till B returns from Rome, etc., there is a present capacity on the part of the remainder to take effect in possession, if the possession were at any moment to become vacant. Yet the remainder is a contingent remainder. But it is said in the books, in connection with this definition, that there must be no intervening circumstance in the nature of a condition precedent. Now, we say that this explanatory item certainly cannot be inferred from the terms of the definition itself.

A third test by which to distinguish the vested from the contingent remainder, is given by Professor Gray in his *Perpetuities*,<sup>3</sup> and while it does not cover all the cases, it covers so many cases which come up every day in modern times, that we prefer it to any of the tests for practical purposes. It is this: If there be vested language calculated to vest the

<sup>1</sup> 2 Wash. R. P. 251, 252; Smith's Essay, § 180; Harvard College v. Balch, 49 N. E. Rep. 543 (Ill.).

<sup>2</sup> 2 Wash. R. P. 228.

<sup>3</sup> Gray on Perp. §§ 9, 101, 102 *et seq.*, 108.

gift in the remainderman, and that be followed by a clause divesting the gift upon the happening of the contingency, there is a vested remainder. It is a vested remainder defeasible upon a condition subsequent. But if the conditional or contingent words be incorporated into the language of the gift, there is a contingent remainder. *Blanchard v. Blanchard*<sup>1</sup> is a case of a vested remainder defeasible upon a condition subsequent. This was a devise of real estate to the testator's widow for life, and upon her decease to five of a larger number of the testator's children, which five he mentioned by name. Stopping there, we should have a very plain case of the vested remainder absolute. But this was followed by the clause of defeasance which was, in substance, provided, however, that "if any of these children shall die before my wife," their share or shares to go over to the survivors, meaning those who shall survive the wife. Now, first, it is to be noticed that the gift to the children was without any words of inheritance. Yet as it is common in wills, as already shown, to omit the word "heirs," it was held that they took a fee, because it was so obvious that such was the intention of the testator. The clause of defeasance following the vested

<sup>1</sup> *Blanchard v. Blanchard*, 1 Allen, 223. In *Hill v. Bacon*, 106 Mass. 578, a testatrix devised land to A for life, remainder to the "children" of the testatrix, in fee, and if either shall at the death of A have deceased, leaving issue, such issue shall take their parents' portion of such estate. It was held to be a vested remainder absolute in the children. Very generally limitations over to the issue of the beneficiary have been sustained by the courts. *Tindall v. Miller*, 41 N. E. Rep. 535 (Ind.); *In re Clark*, 31 Ch. Div. 72; *In re Noyes*, 31 Ch. Div. 75; *Robinson v. Palmer*, 38 Atl. Rep. 103 (Me.); *Shaw v. Eckley*, 169 Mass. 122; *Hills v. Barnard*, 152 Mass. 72; *Jackson v. Jackson*, 153 Mass. 377; *Barker v. Barker*, 2 Sim. 249, cited in 1 Wash. R. P. 140; *Moore v. Hare*, 43 N. E. Rep. 870, 871 (Ind.); *Exton v. Hutchinson*, 32 Atl. Rep. 684 (N. J. Ch.); *Small v. Small*, 45 Atl. Rep. 190 (Md.); *Seaver v. Griffing*, 176 Mass. 59; *In re Carstensen's Estate*, 46 Atl. Rep. 495 (Penn.); *Mitchell v. Mitchell*, 47 Atl. Rep. 325 (Conn.); *Kernochan v. Marshal*, 59 N. E. Rep. 295 (N. J.); *Sandkull v. Schnadhorst* (1902), 2 Ch. 234; *Kimball v. Tilton*, 118 Mass. 311; *Wilmarth v. Bridges*, 113 Mass. 407; *Dodd v. Winship*, 133 Mass. 359; *Clark v. Cammann*, 54 N. E. Rep. 709 (N. Y.).



language was calculated to divest the gift upon the happening of the contingency, and the result was that the children took the vested remainder defeasible upon condition subsequent. What was the gift over to the survivors, which was also a fee although without the word "heirs"? It was not a remainder, because it is a case of a fee upon a fee; and, of course, a remainder must take for its particular estate a life estate or an estate tail, as before shown. It is evidently a conditional limitation, because it is calculated to cut short the fee already given; and being in a will, it is called an executory devise. It belongs to the first class of the executory devise. Of course, it is not good at common law, but is good in a will, and is good in a limitation to uses. *Olney v. Hull*,<sup>1</sup> is in contrast with *Blanchard v. Blanchard*, *supra*. Here the conditional or contingent words are incorporated into the language of the gift, and with the result that we get a contingent remainder. *Olney v. Hull* was substantially this: A devise of real estate to the testator's wife so long as she shall remain his widow, and upon her marriage or death, the land to be then divided among his surviving sons. These are the material parts of the devise. The word "then," it was held, and this has been approved in several later Massachusetts cases,<sup>2</sup> was to be read in connection with the word "surviving." The estate given to the widow was a life estate upon limitation, and the taking effect of the remainder upon her marriage, should she marry, could no more cut short her life estate, than would the return of B from Rome and the taking effect of the estate of C, cut short the life estate of A in the above case of to A till B returns from Rome, etc. In each case the life estate is upon limitation. In *Penny v. Commis-*

<sup>1</sup> *Olney v. Hull*, 21 Pick. 311.

<sup>2</sup> *Wight v. Shaw*, 5 Cush. 61; *Holm v. Low*, 4 Met. 201; *Thomson v. Ludington*, 104 Mass. 194; *Dore v. Tarr*, 128 Mass. 40. See also *Denny v. Kettell*, 135 Mass. 139; *Colby v. Duncan*, 139 Mass. 398; *Gibbens v. Gibbens*, 140 Mass. 104; *Smith v. Rice*, 130 Mass. 441; *Hale v. Hobson*, 167 Mass. 401.

sioners<sup>1</sup> which is a recent decision of the Privy Council, and the opinion is by Lord Lindley, there was in substance a devise of real estate to the testator's widow for life, and then over to the testator's children, naming them; and this vested gift to the children was followed by the clause, "or such of them as should be living at the time of the decease of my said wife, and attain twenty-one years of age." This is a case of vested language, with the conditional or contingent words introduced into a subsequent clause. It is, therefore, a case of the vested remainder defeasible upon condition subsequent. Now, should all of them survive the wife and attain the given age, it is plain that they would all take estates in possession. But it is equally true that their vested gifts would not be divested if none of them should survive the wife and attain the given age, because there would be nobody to take the gift over. They, therefore, are as well off if they all die before the wife and fail to attain the given age, as if they all survive the wife. In the event of all dying before the wife, and failing to attain the given age, since they take estates in fee, their respective estates will descend to their heirs like any estate of inheritance. But if some should survive and some should not, then they who should survive and attain the given age would take it all. The limitation over to the survivors is, as in *Blanchard v. Blanchard*, *supra*, a fee upon a fee, and is, therefore, a conditional limitation, and being in a will is called an executory devise.

In our opinion, the secret of the construction in such cases as we have just examined, is not so much that the courts find an intention on the part of the testator to make the one a vested and the other a contingent remainder, as it is that the one form of language strikes the judicial mind as calculated to confer a vested but defeasible interest, and the other form of language to confer a contingent interest. Yet, doubtless, it would be said that it is the intention of the testator which

<sup>1</sup> *Penny v. Commissioners* (1900), App. Cas. 628.

governs. But the intention of the testator in such cases is really rather a fiction than a fact, for it is not probable that he had any intention on the point. The courts are every day repeating the old rule, that the intention of the testator is the guide. But we shall later find cases where certain language has one import in a will, and certain other language another import, and there are even cases not very far back in the books, where the courts have distinctly refused to follow the intention of the testator, because he has used technical words which must have their legal meaning.

The next test by which to distinguish a vested from a contingent remainder, is that given by Mr. Williams, in his *Real Property*.<sup>1</sup> It is that a contingent remainder is one which is not ready, from its commencement to its end, to come into possession at any moment when the prior estates may happen to determine. With reference to a discussion of some of these tests, we will mention three familiar forms of the contingent remainder, of which the first and third classes are found in every-day practice. First, remainders to unborn persons, excepting a child *en ventre sa mere*, that is, a child conceived, but not born. Secondly, remainders to the heirs of a living person. The maxim of law is, *nemo est haeres viventis*, that is, a living person cannot have an heir. Thus, to A for life remainder to the heirs of B, a living person. This is a contingent remainder in fee-simple. If B die immediately, there is an heir, and if he die before A, the contingent remainder becomes a vested remainder. If he outlive A, the contingent remainder has failed, because it could not arise immediately, according to the rule above given. The third class is of remainders to survivors, of which *Olney v. Hull*, above given, is a good illustration. The present capacity test seems to do very well for these three classes. There certainly is no present capacity in the first and second classes, and even in the third class there is no present capacity, because if one of the

<sup>1</sup> Williams, R. P. 267.

remaindermen die during the existence of the particular estate, there is no present capacity so long as that particular estate thereafter continues; and we think that it is fair that the capacity intended by the definition should necessarily last throughout the duration of the particular estate. Mr. Williams' definition, above given, is very good for the first two of the above classes, but we think it fails as applied to *Olney v. Hull* and that class of cases. We think that a remainderman in *Olney v. Hull* may say of his estate that it is ready, from its commencement to its end, to take effect in possession at any moment when the particular estate may happen to determine. It may end by failure or it may end by success. If the remainderman die while the particular estate continues, his remainder has come to an end by failure; but we think it was ready from its commencement to its end, and on the contrary, should it succeed in taking effect, it was likewise ready from its commencement to its end. Mr. Williams' definition is also defective as applied to the form: to A till B returns from Rome, etc. We think the estate of C is ready from its commencement to its end. It may end by the death of A without B having returned from Rome, in which case it fails; on the contrary it may end by taking effect in possession because of the return of B while A still lives, in which case it succeeds.

In *Marsh v. Hoyt*,<sup>1</sup> the words, "to take effect at the decease" of the tenant for life of the particular estate, were held not to make the estate of the remaindermen contingent, but that, there being nothing to the contrary, they had a vested remainder absolute. Had such language been held to make the remainder contingent, then only those surviving the life tenant could have taken, and it was held that a remainderman dying, pending the particular estate, his estate in fee descended to his heirs. From this, it must not be inferred that contingent remainders of estates of inheritance will not de-

<sup>1</sup> *Marsh v. Hoyt*, 161 Mass. 459.

scend. It is true that they very often fail to do so, but there is no rule of the sort. Thus an unborn person's remainder, of course, cannot descend; that would be impossible; nor can a remainder to the heirs of a living person; nor can a remainder to a survivor, because it is his death during the particular estate which destroys his remainder. But, of course, after the remainder of the estate of inheritance has vested in interest or taken effect in possession, then the remainderman dying, his estate will descend to his heirs. But to show that a contingent remainder of an estate of inheritance may descend, take the case of to A till B returns from Rome, etc., and let C die, his remainder will pass to his heirs, and when B returns from Rome during the lifetime of A, the remainder to C will take effect in possession in his heirs.

In remote times contingent remainders were regarded as so unsubstantial that they were unassignable. We may divide contingent remainders into two classes: (1) those in which the contingency is of the event; (2) those in which the contingency is of the person. Contingent remainders of the former class are assignable. They may be assigned, at law, by fine, and perhaps by common recovery, and the assignment will operate by way of estoppel. If, however, the assignment be by deed, it will not, at law, transfer the interest except the deed be a deed of release;<sup>1</sup> for, as generally in real-property law, the thing may be released. The release would be, say to the reversioner; for instance, we have already seen under dower how the inchoate right may be released. But contingent remainders of the class we are considering may be assigned in equity, that is, a court of equity will recognize the validity of the assignment,<sup>2</sup> and they may be devised, pro-

<sup>1</sup> *Williams v. Exton*, 53 N. E. Rep. 562 (Ill.); 1 *Preston on Estates*, 76, 89; *Fearne on Rems.* 365, 366, 551; 2 *Wash. R. P.* 236, 237, 238, 263, 264, 267, 367; *Challis, R. P.* 58; 4 *Kent's Com.* 261, 262, 284; 2 *Shars. & Budd*, 368-371; *Williams, R. P.* 264, 265; *Gray on Perp.* § 134.

<sup>2</sup> 2 *Wash. R. P.* 341, 357, 367, 368; *Roe d. Perry v. Jones*, 1 H. Black. 30; *Jones v. Perry*, 3 *Term Rep.* 88, 94; *Fearne on Rems.* 548, note f;

vided, of course, that the thing is possible, and the devise is good even at law.<sup>1</sup> Take such a case as *Olney v. Hull*, *supra*. A devise of the contingent remainder would be impossible, because the death of the contingent remainderman would defeat his remainder; and his will, of course, can only take effect at his death. When we speak of the devisableness, we, of course, are thinking of contingent remainders in fee. Modern statutes have generally made these contingent remainders assignable.<sup>2</sup> As to contingent remainders contingent upon the person, these are of two classes: (1) to unborn persons; (2) to the heirs of a living person.<sup>3</sup> Of course, an

Watkins on Conv. (8th ed.) 217, 218; Gray on Perp. § 268; Jarman on Wills (6th ed.), 49.

<sup>1</sup> See the authorities in note 2, page 167, above.

<sup>2</sup> Gray on Perp. § 268. In Massachusetts the statute provides (Massachusetts Revised Laws, ch. 134, § 2) that any executory interest may be assigned or devised, provided that it would descend to the heirs in fee simple, in case of death before the happening of the contingency. The Massachusetts judicial law is more liberal than the above statute; for it permits contingent remainders to be assigned, even when they would not descend to the heirs in fee simple in case of death, before the happening of the contingency. A good illustration is the case of *Nash v. Nash*, 12 Allen, 349, which was a devise to the testator's widow for life, and then over to such of the testator's children as should be living at the death of the widow. One of these children assigned his interest during the widow's lifetime, and survived her. It was held that his contingent remainder passed by his assignment. In point of fact the nature of this assignment was not by deed, but he went into bankruptcy; and it was held that his interest passed under the bankrupt law to the assignee in bankruptcy. But the principle is the same whether it be by deed or by bankruptcy, or insolvency. The Massachusetts Court speaks of contingent remainders which are assignable, as vested interests in a contingent remainder. This language is objectionable as tending to confuse the mind, for there can be no vested interest in a contingent remainder. All that is meant is that the interest has an assignable quality. Gray on Perp. § 118.

<sup>3</sup> 2 Wash. R. P. 237, 238. It is said in *Hillen v. Iselin*, 144 N. Y. 374, 375, that strictly, a living person cannot have a "descendant," but that he may have "issue." But Shaw, C. J., in *Baker v. Baker*, 8 Gray, 120, says that a living person may have "descendants," although he cannot have "heirs."

The phrase "next of kin," ordinarily means the nearest blood relations, and not descendants also of deceased ones, in a gift to the next of kin;

unborn person cannot assign his interest. The books constantly speak of remainders to unborn persons as contingent remainders;<sup>1</sup> and we shall use this language hereafter for the sake of brevity. But as we have above pointed out, there is an exception, and that is, in the case of a child *en ventre sa mere*. The child takes a vested remainder from the moment of conception. This was first held in *Reeve v. Long*,<sup>2</sup> by the House of Lords. Such great dissatisfaction was felt with the decision by the common lawyers of England, that the statute of 10 and 11 William III. ch. 16, was passed to confirm, as it were, the decision.<sup>3</sup> In the United States there is more or less statutory law, but whether with or without statute, the rule in the United States is that a child *en ventre sa mere* is capable of taking a vested remainder.<sup>4</sup> Further, as to contingent remainders contingent upon the person, the maxim *nemo est haeres viventis* applies. Suppose, then, there be a limitation to A for life, remainder to the heirs of B, and that B be a person *in esse*; B dies, A surviving, and X is the heir of B; of course

that is, the earlier generation takes to the exclusion of the descendants of deceased members of that generation. *Swasey v. Jaques*, 144 Mass. 135; *In re Gray's Settlement* (1896), 2 Ch. 802; *Keniston v. Mayhew*, 169 Mass. 166; *Leonard v. Haworth*, 171 Mass. 496.

See further *Blagge v. Balch*, 162 U. S. 439, as to the meaning of that phrase (next of kin) in the French Spoliation Acts, overruling 157 Mass. 144. See 159 Mass. 480; 167 Mass. 499.

The principle of "*nemo est haeres viventis*" applies to a bequest to the next of kin, the will providing that they are to be ascertained under the statute of distributions. *In re Parsons*, *Stockley v. Parsons*, 45 Ch. Div. 63; *Clarke v. Hayne*, 42 Ch. Div. 529. See further, *Fargo v. Miller*, 150 Mass. 225; *In re Rees*, 44 Ch. Div. 484; *Hood v. Murray*, 14 App. Cas. 124, 137; *Codman v. Brooks*, 167 Mass. 504; *Beilstein v. Beilstein*, 45 Atl. Rep. 73 (Penn.).

<sup>1</sup> See for instance, *Wight v. Banny*, 7 Cush. 107; *Carver v. Jackson*, 4 Pet. 90; *Sisson v. Seabury*, 1 Sumner, 243.

<sup>2</sup> *Reeve v. Long*, 1 Salkeld, 227. A child *en ventre sa mere* is "issue living." *In re Burrows* (1895), 2 Ch. 497.

<sup>3</sup> *Stedfast v. Nicoll*, 3 Johns. Cas. 25 and authorities there cited; *Fearne on Rems.* 308; *Challis*, R. P. 111.

<sup>4</sup> 2 Shars. & Budd, 356-358; 4 Kent's Com. 249, 412; Tied. R. P. § 397.

he has now a vested remainder. But suppose that during his ancestor's lifetime he conveyed the land; his assignment is ineffectual. We must not forget, however, that a man may convey land with a covenant of general warranty which is an everyday transaction, and he will be estopped by his covenant. That is a very different proposition from his mere deed being effectual; for a covenant of general warranty estops the grantor to set up any title which he had at the time the deed was delivered, and any title which he may thereafter acquire. Hence, if the land be conveyed with such a covenant, the title passes, not because the contingent remainder was assignable, nor because it was duly assigned, but because the grantor is estopped by his covenant of general warranty. We now point out, however, a qualification of this principle concerning the unassignableness of a contingent remainder, contingent upon the person. It was held in *Putnam v. Story*<sup>1</sup> that an heir apparent may make a valid assignment of his contingent remainder, while an heir presumptive cannot. Suppose there be a limitation to A for life, remainder to his heirs, or suppose there be a limitation to A for life, remainder to the heirs of B, and that A and B be living persons. Under the rule in *Shelley's Case*, which we shall soon consider, in the first case A would take a fee simple; but the rule in *Shelley's Case* has been much modified in Massachusetts by statute, so that in Massachusetts A will take a life estate, with contingent remainder to his heirs. Now, if in either of these cases the ancestor have an heir apparent, such heir may make a valid assignment of his contingent remainder. But if he have an heir presumptive such heir cannot make a valid assignment of his contingent remainder.<sup>2</sup> It is true that even in the case of the heir apparent, the assignment will come to nothing unless the assignor shall become the heir; for he may die before his ancestor, and so never become heir. An heir

<sup>1</sup> *Putnam v. Story*, 132 Mass. 210, 211.

<sup>2</sup> *Putnam v. Story*, 132 Mass. 210, 211; *Godwin v. Banks*, 40 Atl. Rep. 268 (Md.).



apparent is a person who, if the ancestor were to die this moment, would be his heir, and who cannot be displaced as heir by any after birth. An heir presumptive is a person who if the ancestor were to die this moment would be his heir, but who may be displaced by an after birth. A man's own children, therefore, are necessarily heirs apparent. But a man's brother can never be more than an heir presumptive, because he would be displaced as heir by the birth of a child to the ancestor. The assignment may be by deed, or it may be by the party's going into bankruptcy or insolvency, and his interest passing under the bankrupt or insolvent law to the assignee in bankruptcy or insolvency for the benefit of the creditors. In Rhode Island, in *Mudge v. Hammill*,<sup>1</sup> the doctrine as to the power of the heir apparent is not fully accepted. It is said that the assignment is not good at law, but that it is good in a court of equity.

There are many cases in which such an expression as follows is found: At the decease of the life tenant, "I then give" the estate. The decided weight of authority is that the gift is present and not future, so that such language is calculated to give a vested remainder.<sup>2</sup> The courts have always said that they lean strongly toward the vesting of interests, and that where language is equivocal they will prefer the construction of a vested remainder to the construction of a contingent remainder. But if the will read that at the decease of the life tenant, the estate shall go to certain persons "then living," the late cases in leading states of this country hold that the remainder is a contingent remainder, and such is the rule in Massachusetts.<sup>3</sup> It

<sup>1</sup> *Mudge v. Hammill*, 43 Atl. Rep. 544 (R. I.).

<sup>2</sup> *Darling v. Blanchard*, 109 Mass. 176; *Dole v. Keyes*, 143 Mass. 237; *Pike v. Stephenson*, 99 Mass. 188; *Hill v. Bacon*, 106 Mass. 578; *Gibbens v. Gibbens*, 140 Mass. 104; 2 Shars. & Budd, 292; *Doe d. Poor v. Considine*, 6 Wall. 458; *Corse v. Chapman*, 47 N. E. Rep. 813 (N. Y.); *Chambers v. Sharp*, 48 Atl. Rep. 222 (N. J. Ch.).

<sup>3</sup> *Colby v. Duncan*, 139 Mass. 398; *Gibbens v. Gibbens*, 140 Mass. 104; *Smith v. Rice*, 130 Mass. 441; *McGillis v. McGillis*, 49 N. E. Rep.

may be unfortunate that the scrivener has pointed out so explicitly by the word "then" the time to which the period of survivorship shall be referred, namely, to the death of the tenant for life. But such explicit language it is difficult to get around. We may think of these two classes of cases with their opposite results as "then giving" and "then living."

In such cases as those last considered and in *Olney v. Hull*, *supra*, we find the period of survivorship to be referred to the time of the expiration of the life estate by the use of the word "then" or some equivalent expression, with the result that we have a contingent remainder. But suppose, as is very common, that there be no such word or other language referring the period of survivorship to any definite time. The courts are all the time telling us that they prefer vested to contingent gifts, and yet there are more or less late cases in which they seem to violate this rule. The leading case in favor of the vested remainder construction and which has been frequently cited, is *Moore v. Lyons*.<sup>1</sup> It was a devise of real

145 (N. Y.); *Hillen v. Iselin*, 144 N. Y. 365; *R. I. Hospital Co. v. Harvis*, 39 Atl. Rep. 750 (R. I.); *Godwin v. Banks*, 40 Atl. Rep. 268 (Md.); *Paget v. Melcher*, 51 N. E. Rep. 24 (N. Y.); *Hopkins v. Keazer*, 36 Atl. Rep. 615 (Me.); *Hall v. La France Co.*, 53 N. E. Rep. 513 (N. Y.); *In re Ralston's Estate*, 33 Atl. Rep. 273 (Penn.); *Small v. Small*, 45 Atl. Rep. 190 (Md.); *In re Everett's Estate*, 46 Atl. Rep. 1 (Penn.); *Webber v. Jones*, 47 Atl. Rep. 903 (Me.); *Galliers v. Rycroft* (1901), App. Cas. 130; *In re Coley* (1901), 1 Ch. 40; *Thompson v. Luddington*, 104 Mass. 193; *Nash v. Nash*, 12 Allen, 345; *Bigelow v. Clap*, 166 Mass. 91; 2 Shars. & Budd, 342; *Bamforth v. Bamforth*, 123 Mass. 280.

There is a class of cases in which a provision that at the expiration of the life estate trustees shall convey to a class, or a provision that at such expiration trustees shall sell and divide the proceeds amongst a class, has been held to make the remainder to the class a contingent interest. *Strode v. McCormick*, 41 N. E. Rep. 1091 (Ill.); *In re Baer*, 41 N. E. Rep. 702 (N. Y.); and see *Heard v. Reed*, 169 Mass. 224; *In re Crane*, 58 N. E. Rep. 47 (N. Y.). This principle was not applied in *In re Hurlburt's Estate*, 40 N. E. Rep. 226 (N. Y.).

<sup>1</sup> *Moore v. Lyons*, 25 Wend. 119. In a gift to A and to the testator's wife and then over to the issue of A if A should die before the wife, this was held to mean A's dying before the wife in the testator's lifetime. *In re Tompkin's Estate*, 49 N. E. Rep. 135 (N. Y.).

estate to A for life and after her decease to B, C, and D, three daughters of A, or to the survivor or survivors of them, their heirs and assigns. There being nothing to indicate the time to which to refer the period of survivorship, the court held that they took vested remainders absolute, and that the period of survivorship was to be referred to the death of the testator and not to the death later of the tenant for life. In Massachusetts, the other rule obtains. In *Coveny v. McLaughlin*,<sup>1</sup> the devise of real estate was to the testator's widow for life, but on her decease to his surviving children, to be equally divided between them. It was held to be a contingent remainder, or at least that only those who should survive the life tenant could take. This is hard doctrine and very strict. Suppose, for instance, that one of the children should die before the life tenant, leaving a family. That family would be cut off, and yet they might be the most in need of the property. They might be infants, and very likely would be infants; and in this particular case they would be the grandchildren of the testator. We think no grandparent would intend any such result in his will. The law in England used to be in harmony with *Moore v. Lyons*, *supra*; but we understand that the later English cases are in conformity with the opposite doctrine.<sup>2</sup> In the United States, there is no settled rule.<sup>3</sup> It is needless to add that we prefer the doctrine of *Moore v. Lyons*.

If there be a limitation to A for life, remainder to his children, or if there be a limitation to A for life, remainder to the children of B, the children, if born, take vested remainders; and, as we have already seen, a child *en ventre sa mere* will

<sup>1</sup> *Coveny v. McLaughlin*, 148 Mass. 576. See further *Hills v. Barnard*, 152 Mass. 67, 70; *Spear v. Fogg*, 32 Atl. Rep. 791 (Me.).

<sup>2</sup> 2 Shars. & Budd, 297-302; *In re Pickworth* (1899), 1 Ch. 642; *Bowman v. Bowman* (1899), App. Cas. 526.

<sup>3</sup> 2 Shars. & Budd, 297-302; 1 Dembitz on Land Titles, page 663; *Robinson v. Palmer*, 38 Atl. Rep. 103 (Me.); *Grimmer v. Frederick*, 45 N. E. Rep. 498 (Ill.).

take a vested remainder. These vested remainders open to let in the after-born. And the after-born members of the class likewise take vested remainders. These cases are of every-day occurrence. But the class closes, which means that no after-born members are included, when the remainder has become an estate in possession. It is remainders which open to let in the after-born and not estates in possession.<sup>1</sup> Doubtless, however, a child *en ventre sa mere* would be let in. We do not speak of a contingent remainder as opening, simply because it is not vested. There is nothing to open, therefore the books always express the proposition that it is vested remainders which open. It is fortunate that estates in possession do not open, because so long as estates can open the marketable value of the property is obviously impaired. A remainderman cannot sell his right for very much if it be uncertain whether the number of the shares will be increased; and to allow this inconvenience to extend to the estate in possession would be very objectionable.

There is a very large class of every-day cases of limitation to A for life, with a power given him to convey away the property and consume the proceeds, and what shall remain at his death to go over to certain ascertained persons in fee. There being nothing of a contingent nature in the gift except the uncertainty as to whether A will consume some or all of the property, these remainders are vested remainders.<sup>2</sup> So we

<sup>1</sup> 2 Wash. R. P. 230; 4 Kent's Com. 205; Tudor's Lead. Cas. (3d ed.) 803; 2 Jarman on Wills (5th ed.), 156 *et seq.*; Gray on Perp. § 110; Dole v. Keyes, 143 Mass. 238, 239; Hatfield v. Sohler, 114 Mass. 48; Hills v. Simonds, 125 Mass. 538; *In re Wing's Estate*, 48 N. E. Rep. 540 (N. Y.); Barclay v. Platt, 48 N. E. Rep. 972 (Ill.); Corse v. Chapman, 47 N. E. Rep. 812 (N. Y.); Hinkson v. Lees, 37 Atl. Rep. 338, 339 (Penn.); Bank v. Lees, 35 Atl. Rep. 197 (Penn.); Johnson v. Webber, 33 Atl. Rep. 506 (Conn.); Security Co. v. Cone, 31 Atl. Rep. 7 (Conn.); *In re Bradley's Estate*, 31 Atl. Rep. 97 (Penn.); Miller v. Worrall, 44 Atl. Rep. 890 (N. J. Ch.); Mitchell v. Mitchell, 47 Atl. Rep. 325 (Conn.); McArthur v. Scott, 113 U. S. 340.

<sup>2</sup> Bancroft v. Fitch, 164 Mass. 401; Hawkins v. Bohling, 48 N. E. Rep. 94, 96 (Ill.); Skinner v. McDowell, 48 N. E. Rep. 310 (Ill.); Harvard

see that the test of a vested remainder is not how much of the property the remainderman may enjoy.

If there be a devise to two or more persons for their lives, thus, to A and B for their lives, and upon their decease to go over to their children, the question may arise as to the nature of these vested remainders to the children; for, as above shown, they are vested remainders, capable of opening to let in the after-born. The question is, first, whether the children of A, upon his death, B surviving, are entitled to the possession of the one-half which A had enjoyed, or whether they are to be postponed as to the enjoyment until the decease of B. Assuming that they are to be postponed, the next question is whether they take *per stirpes* or whether they take *per capita*. If they take *per stirpes*, they take the one-half part as the children of A. If they take *per capita*, then the property is divided into as many shares as constitute the total number of the children of both A and B. In *Dole v. Keyes*,<sup>1</sup> it was held that the children of A, A dying, were to be postponed as to the enjoyment of the property until the death of B, that they took vested remainders which opened to let in the after-born, and that they took *per capita*, and that as each one took a vested remainder his share upon his decease would descend to his heirs, so that the total number of shares would be the same as the total number of the children which A and B had had. The question as to whether the possession shall be postponed until the expiration of all the life estates, so that the life tenants have their enjoyment increased as their number diminishes, is a question of construction of the words of the will. In *Gardiner v. Savage*,<sup>2</sup> the court held that the two

*College v. Balch*, 49 N. E. Rep. 543 (Ill.); *Lehnard v. Specht*, 51 N. E. Rep. 315 (Ill.); *Woodman v. Woodman*, 35 Atl. Rep. 1037 (Me.).

<sup>1</sup> *Dole v. Keyes*, 143 Mass. 239.

<sup>2</sup> *Gardiner v. Savage*, 182 Mass. 521. See further *Loring v. Coolidge* 99 Mass. 191; *Merriam v. Simonds*, 121 Mass. 198; *Hills v. Simonds*, 125 Mass. 536; *Houghton v. Kendall*, 7 Allen, 72; *McArthur v. Scott*, 113 U. S. 340; *In re Campbell's Trusts*, 33 Ch. Div. 98; *Hopkins v. Keazer*,

life tenants did not take the estate during their joint lives, but that on the death of one of them that one's share passed to that one's children.

36 Atl. Rep. 619 (Me.) ; *Bartine v. Davis*, 46 Atl. Rep. 577 (N. J. Ch.) ; *Van Grutten v. Foxwell* (1897), App. Cas. 677, 686 ; *Rhode Island Hospital v. Peckham*, 38 Atl. Rep. 1001 (R. I.). In the case of a trust to pay the income to testator's brothers and sisters for life, and upon the decease of either of them, their interest to pass to their children, "and after the decease of all" the capital to be equally divided between the children of the brothers and sisters, share and share alike, it was held that while the income was to be divided *per stirpes* the capital was to be divided *per capita*. *In re Stone*, *Baker v. Stone* (1895), 2 Ch. 196.

## CHAPTER XIV.

JOINT TENANCIES, TENANCIES IN COMMON, AND TENANCIES  
BY THE ENTIRETIES.

WE would next take up the subject of cross remainders, were it not that the comprehension of that subject requires some understanding of the law of joint tenancy and tenancy in common. We have already in our chapter on the descent of land at common law explained the subject of co-parcenary. We wish now to consider the subjects of joint tenancy, tenancy in common, and tenancy by the entireties. At common law two or more persons not husband and wife, taking together as purchasers, take as joint tenants unless there be some words in the instrument indicating that they are to take as tenants in common. A very essential ingredient in joint tenancy is the element of survivorship. The survivor takes the whole of the property. At the common law there is what is called in joint tenancy a fourfold unity, namely, the unity of time, title, interest, and possession.<sup>1</sup> The element of time is, that the estates of the joint tenants must vest at one and the same time.<sup>2</sup> But the element of time is not essential in limitations by way of use or devise; for, in these, after-born persons may come in as joint tenants.<sup>3</sup> A joint tenancy may be terminated either by partition or by alienation. If a partition be made, each tenant owns his particular part in severalty. If an alienation be made, the joint tenancy becomes a tenancy in common. In each of these cases the element of survivorship is defeated.

<sup>1</sup> 2 Black. Com. 180.

<sup>2</sup> 2 Black. Com. 181.

<sup>3</sup> Challis, R. P. (2d ed.) 334, 335; Hawkins on Wills (2d Am. ed.), 111.

But if A, B, and C be joint tenants, and A aliens his part (his undivided share) his grantee becomes a tenant in common with B and C; and B and C remain joint tenants as to each other. It seems that the better opinion is that a lease for life made by a joint tenant in fee simple severs the jointure; but it is otherwise in the case of a mere lease for years made by the joint tenant in fee simple.<sup>1</sup> The hardship involved in joint tenancy has caused the legislatures of the different states in this country to make purchasers, taking together, take as tenants in common instead of as joint tenants; thereby getting rid of the element of survivorship. In other words, the presumption is, that they take as tenants in common, and not as joint tenants; but they may take as joint tenants if the language be such as to show such to have been the intention of the instrument; and there is this further exception, as for instance, in the Massachusetts statutes, that trustees and mortgagees presumptively take as joint tenants. But in Massachusetts upon possession taken by the mortgagees upon foreclosure, they come to hold as tenants in common.<sup>2</sup>

One tenant in common has a right to the possession of the whole land until his co-tenant wishes to share the possession with him. He, therefore, is not liable for rent for the use he has made of the premises.<sup>3</sup> But recently it was held in New Hampshire, and that too without reliance upon any statute, that a tenant in common in possession may be held liable to his co-tenant for rent.<sup>4</sup>

A tenant in common is not liable in tort to his co-tenant for entering upon the land and taking the crops.<sup>5</sup> But if the tenant in common who has raised the crop has severed it from

<sup>1</sup> Challis, R. P. (2d ed.) 335, note. See further, *Palmer v. Rich* (1897), 1 Ch. 134. Marriage of a female joint tenant does not work a severance of the joint estate. *Palmer v. Rich* (1897), 1 Ch. 134.

<sup>2</sup> Jones, R. P. §§ 1824, 1825.

<sup>3</sup> *Peck v. Carpenter*, 7 Gray, 283; *Blood v. Blood*, 110 Mass. 547.

<sup>4</sup> *Gage v. Gage*, 29 Atl. Rep. 543 (N. H.).

<sup>5</sup> *Silloway v. Brown*, 12 Allen, 37, 38.



the ground, and his co-tenant comes and carries it away, trover will lie.<sup>1</sup> But under the statute of Anne (4 Anne, ch. 16), one tenant in common who has planted and reaped the crops and sold them is liable in contract to the other for the other's share of the net proceeds.<sup>2</sup> Under the statute of Anne, a tenant in common can maintain an action of contract at law for rents received by the other tenant.<sup>3</sup> But one tenant in common is not liable in an action at law to his co-tenant for necessary repairs made by him, or for improvements made by him.<sup>4</sup> But a tenant in common is allowed in equity to reimburse himself for necessary repairs and for improvements made by him; and this is usually worked out by proceedings brought for partition.<sup>5</sup>

If a tenant in common in possession refuses to allow his co-tenant to enter upon the land, or if being in possession or entering to take possession, he asserts a claim to the ownership of the land in denial of the rights of his co-tenant, this amounts to a disseisin, and a writ of entry will lie against him; and if he refuses to allow his co-tenant to enter (as above), an action of trespass *quare clausum fregit*, as well as a writ of entry, will lie against him.<sup>6</sup>

If a tenant in common convey the whole land, and not simply his undivided share, or convey a part of the land by metes and bounds, this is good as against him by way of es-

<sup>1</sup> Jones, R. P. § 1889.

<sup>2</sup> Silloway v. Brown, 12 Allen, 38; Peck v. Carpenter, 7 Gray, 283; Blood v. Blood, 110 Mass. 547; Dewing v. Dewing, 165 Mass. 230; Robinson v. Robinson, 173 Mass. 233.

<sup>3</sup> 4 Kent's Com. 369, 370; Jones, R. P. §§ 1884, 1917 *et seq.* See further, § 1891.

<sup>4</sup> Calvert v. Aldrich, 99 Mass. 74; Jones, R. P. § 1898 *et seq.*

<sup>5</sup> Jones, R. P. §§ 1904 *et seq.*; 10 Harv. Law Rev. 63. See *In re Jones* (1893), 2 Ch. 478; Williams v. Coombs, 33 Atl. Rep. 1073 (Me.).

<sup>6</sup> Silloway v. Brown, 12 Allen, 37, 38; Marcy v. Marcy, 6 Met. 360; Byam v. Bickford, 140 Mass. 34; Peck v. Carpenter, 7 Gray, 283; Kotz v. Belz, 53 N. E. Rep. 367 (Ill.); Stull v. Stull, 47 Atl. Rep. 240, 242 (Penn.); Dawson v. Edwards, 59 N. E. Rep. 590 (Ill.); 2 Dembitz on Land Titles, § 183; Harford v. Taylor, 181 Mass. 269.

toppel, and as against everybody, except his co-tenants.<sup>1</sup> But if the land lie in different counties, he may convey his undivided share of the land in any one county, because partition cannot be made of the whole land by proceedings taken in any one county.<sup>2</sup> But if dower has been assigned in a part of the land owned in common, a tenant in common may convey his undivided share, either of the rest of the land or his undivided share of the reversion.<sup>3</sup>

It is an American principle of law, but not recognized in England, that there is a fiduciary relation between tenants in common, so that if a tenant in common purchases an adverse title or purchases or pays off an incumbrance, as for instance, a mortgage upon the land, his co-tenants are entitled to share with him upon the terms upon which he purchased or paid off the above.<sup>4</sup>

If a limitation of real estate be made to husband and wife, they take as tenants by the entireties.<sup>5</sup> The survivor has the

<sup>1</sup> *Frost v. Courtis*, 172 Mass. 402; *McElroy v. McLeay*, 45 Atl. Rep. 898 (Vt.); *Kimball v. Com. Co.*, 173 Mass. 152; *Donworth v. Sawyer*, 47 Atl. Rep. 522 (Me.).

<sup>2</sup> *Peabody v. Minot*, 24 Pick. 329; *Phillips v. Tudor*, 10 Gray, 78; *Blossom v. Brightman*, 21 Pick. 283; *Bonner, Pet.*, 4 Mass. 122; *Marks v. Sewall*, 120 Mass. 174; *Tainter v. Cole*, 120 Mass. 162.

<sup>3</sup> *Peabody v. Minot*, 24 Pick. 329; *Allen v. Libby*, 140 Mass. 82. Under the Massachusetts statutes, a disseisee may maintain a petition for partition, because he is entitled to the immediate possession of the land. But a reversioner is not entitled to maintain a petition for partition unless the particular estate be a mere term of years, in which case he can maintain a petition for partition. *Marshall v. Crehore*, 13 Met. 462; *Wood v. Le Baron*, 8 Cush. 471; *Hunnewell v. Taylor*, 6 Cush. 472; Mass. Rev. Laws, ch. 184, § 50.

<sup>4</sup> *Jones, R. P.* §§ 1835, 1858; *Lawton v. Estes*, 167 Mass. 181, 182; *Boyd v. Boyd*, 51 N. E. Rep. 782 (Ill.); *Enyard v. Enyard*, 42 Atl. Rep. 526 (Penn.); *Whitehead v. Seanor*, 47 Atl. Rep. 978 (Penn.); *Watson v. Watson*, 47 Atl. Rep. 1096 (Penn.). That the above is an American doctrine, and is not recognized in England, see *Kennedy v. De Trafford* (1896), 1 Ch. 762, and on appeal (1897), App. Cas. 189.

<sup>5</sup> *Simons v. Bollinger*, 56 N. E. Rep. 23 (Ind.); 1 Wash. R. P. 424, 425; *In re Young's Estate*, 31 Atl. Rep. 374 (Penn.); *Pray v. Stebbins*, 141 Mass. 221.

whole, which passes to that one's heirs, to the exclusion of the heirs of the other. There can be no severance of the estate by the act of either, and no partition of the estate.<sup>1</sup> But the husband may validly convey his interest to his wife through a third person. This is true in such a state as Massachusetts, where there is no statute providing for a conveyance by a husband directly to his wife.<sup>2</sup> Neither husband nor wife can by any act defeat the other's right of survivorship, except as above. But subject to this principle, the husband has the rights "which are incident to his own property, and the rights which by the common law he acquires in the real property of his wife;" which are, the right to the entire use of the land, and to the entire profits thereof.<sup>3</sup> At common law in a limitation to a husband and wife and a third person, the husband and wife have one half, and the third person the other half.<sup>4</sup> When lands are granted to husband and wife "as tenants in common" they hold by moieties, "as other distinct and individual persons would do."<sup>5</sup>

<sup>1</sup> *Pray v. Stebbins*, 141 Mass. 221; *Pease v. Whitman*, 182 Mass. 363.

<sup>2</sup> *Donahue v. Hubbard*, 154 Mass. 537.

<sup>3</sup> *Pray v. Stebbins*, 141 Mass. 223, 224; *Tudor's Lead. Cas.* (3d ed.) 900; *Morris v. McCarthy*, 158 Mass. 11, 12. At common law, both husband and wife are seised of the estate *per tout* and not *per my*. *Pray v. Stebbins*, 141 Mass. 221.

<sup>4</sup> *In re Jupp*, 39 Ch. Div. 148; *Pray v. Stebbins*, 141 Mass. 222. See L. R. 42 Ch. Div. 306.

<sup>5</sup> *Hunt v. Blackburn*, 128 U. S. 469. By Massachusetts statute, 1885, chapter 237, limitations to husband and wife in Massachusetts are not presumable tenancies by entireties, but are presumable tenancies in common. In Massachusetts it is held that the married women's acts do not affect limitations to husband and wife in real estate; who still continue, so far as those acts are concerned, to take as tenants by the entireties. *Pray v. Stebbins*, 141 Mass. 219. For decisions in different states on this last point which are variant, see cases cited in *Pray v. Stebbins*, *supra*, 223; *Bramberry's Appeal*, 156 Penn. St. 628; 36 Amer. St. Rep. 67, note; 8 Harvard Law Rev. 507, 508; 1 Dembitz on Land Titles, § 27; 3 Univ. Law Rev. 93; *Appeal of Robinson*, 33 Atl. Rep. 652 (Me.). In New York a qualified view is taken as to the effect of the married women's acts upon an estate by the entireties. It is there held that while the element of survivorship is preserved, yet during the joint

At common law, a bequest to husband and wife of personality, also gives them an estate by the entirety.<sup>1</sup> In personality as well as in realty, an estate by the entirety given the husband and wife, confers upon the husband the power of disposition; but it is held in Massachusetts, in *Phelps v. Simons*,<sup>2</sup> that this power cannot affect his wife's interest should she happen to survive him. In *Phelps v. Simons*, the language was to A and his wife and to the survivor of them, and the heirs of such survivor to have and to hold the same forever. But in *Quam v. Quam*,<sup>3</sup> in which the limitation was not to husband and wife, there was a devise to several persons as "joint tenants and not as tenants in common, and to the survivor of them, his or her heirs and assigns forever," and it was held that the devisees were joint tenants for life, with contingent remainder in fee to the survivor. This was because of the added phrase "and to the survivor of them," showing an intention to dispense with the right to sever the jointure of the fee.

lives of the husband and wife, they are equally entitled to the use of the premises, and each can charge (as by mortgage, for instance) his or her moiety only, so as not to affect the estate of the other during that period. But the charge would bind the whole estate in case the party creating it should thereafter be the survivor. *Grosser v. Rochester*, 42 N. E. Rep. 672 (N. Y.); *Hiles v. Fisher*, 39 N. E. Rep. 339, 340 (N. Y.).

<sup>1</sup> *Phelps v. Simons*, 159 Mass. 417; *Bramberry's Appeal*, 156 Penn. St. 628; 36 Am. St. Rep. 67, note; 18 Am. Decisions, 382, 383. The married women's acts do not in Massachusetts apply to limitations to husband and wife of personality, as tenants by the entirety. *Phelps v. Simons*, 159 Mass. 417.

<sup>2</sup> *Phelps v. Simons*, 159 Mass. 415, 418. See *Jones*, R. P. § 1796, and note 5.

<sup>3</sup> *Quam v. Quam* (1892), 1 Q. B. 184. But in a devise by way of remainder to B and C (daughters of the testator) and the survivor of them, it is said that they took an estate in joint tenancy. *Simons v. Simons*, 168 Mass. 144. See further, *Frail v. Carstairs*, 58 N. E. Rep. 401 (Ill.).

## CHAPTER XV.

## THE CROSS REMAINDER.

A CROSS REMAINDER is defined as follows: when particular estates are given to two or more persons in the same, or in different parcels of land, and when in the same land, in undivided shares, and upon the termination of any particular estate, with a limitation over to the other grantees or devisees, these limitations over are cross remainders; and the grantees, or devisees, take their original shares as tenants in common. Illustrations are: to A and B in tail, remainder in A's estate to B in tail, and *vice versa*; to A and B in tail, remainder in A's estate to B in fee, and *vice versa*; to A and B for life, remainder to the survivor in fee; to A and B for life, remainder to the survivor for life.<sup>1</sup>

At the common law, two or more persons taking as purchasers, presumably, take as joint tenants. To enable them to take as tenants in common, there must be some language used to indicate that they are to do so. An essential ingredient in a joint tenancy is the element of survivorship. Now, a joint tenancy may be defeated by a partition of the land;

<sup>1</sup> Hall v. Priest, 6 Gray, 18, 21; 1 Preston on Estates, 95; Tudor's Lead. Cas. (3d ed.) 656-661; Allen v. Tr. of Ashley Sch. Fund, 102 Mass. 265; 2 Black. Com. 381 and note; Fearn on Rents. 450, note; 4 Kent's Com. 201; Parfitt v. Hember, 4 Eq. 443; Taaffe v. Conmee, 10 H. L. Cases, 64; Begley v. Cook, 3 Drewry, 662; 2 Jarman on Wills, 197; 2 Wash. R. P. 233. For a case in which cross remainders were not held as between the original takers themselves, provided they should die leaving issue, their issue then taking the ancestor's share; but were held as to the share of an original taker, who died, not leaving issue, and a surviving original taker, and the issue of a previously deceased original taker, see *in re Ridges Trust*, 7 Ch. App. 665, stated in Tudor's Lead. Cas. (3d ed.) 660.

likewise by an alienation. Suppose there be a limitation to A and B and their heirs. They presumably, at the common law, are joint tenants in fee. Should A die, even though he should leave children, the whole property goes to B in fee as the survivor, absolutely. Should partition be made of the land by A and B, each immediately holds his part in severalty. Should A convey to X and his heirs, assuming no partition to have been made, this severs the joint tenancy, and X and B hold their undivided shares as tenants in common. Now, a cross remainder differs very materially from a joint tenancy, in that it is said by Lord Westbury in *Taafe v. Conmee*,<sup>1</sup> that no act of the tenant can destroy the element of survivorship. It is certainly curious that this element of survivorship should be so strong as to be incapable of being defeated when we consider that the parties take their original shares as tenants in common. It is said in *Parfitt v. Hember*,<sup>2</sup> by Lord Romilly, that there is no practical distinction between joint tenancies for life and cross remainders for life. But there certainly is a practical distinction in the very respect above pointed out by Lord Westbury.

But if there be tenants in tail with cross remainders in tail, one tenant in tail may, by a common recovery, cut off the cross remainder expectant upon his estate. It must be a common recovery, nothing less can effectuate this.<sup>3</sup> Take a limitation to A and B and their heirs. This is presumably at the common law a joint tenancy in fee. It cannot be a cross remainder, because what would have been the particular estate, is a fee, and a fee can never serve as a particular estate to a remainder, as has been already shown. Therefore, at common law such an estate would be a joint tenancy in fee.

<sup>1</sup> *Taafe v. Conmee*, 10 H. L. Cases, 78.

<sup>2</sup> *Parfitt v. Hember*, 4 Eq. 443, 447.

<sup>3</sup> 1 *Preston on Estates*, 110; 3 *Preston on Conv.* 99. As to the methods necessary to be resorted to to cut off the tenant's own title in remainder to the other moiety, see 1 *Preston on Estates*, 113-115.

## CHAPTER XVI.

## THE RULE IN SHELLEY'S CASE.

THE rule in Shelley's Case is announced in Shelley's Case, 1 Coke's Reports, 93 b.<sup>1</sup> But it is vastly more ancient than the days of Lord Coke. It may be defined as follows: When a freehold estate capable of supporting a remainder is limited to a person, with remainder over to that person's heirs, or with remainder over to the heirs of his body, the word "heirs," or the words "heirs of his body," are words of limitation and not words of purchase. Here the word "limitation" is used in a sense in which thus far we have had no occasion to use it, and is the equivalent of "descent" or

<sup>1</sup> Shelley's Case, 1 Coke's Reports, 93 b. The following are some very late cases in England and the United States in which the rule in Shelley's Case has been applied: In a devise to A, and if he marry a gentlewoman and has issue male, to his issue male and their male descendants, it was held that this gave an estate tail male special. *Clinton v. Duke of Newcastle* (1902), 1 Ch. 34. In a devise to A for life and for her heirs, with a failure of heirs clause, over, it was held that A took a fee simple, and that "heirs" was a word of limitation, and did not mean "children." The cases relied upon are cases under the rule in Shelley's Case; *Reimer v. Reimer*, 44 Atl. Rep. 316 (Penn.). In a devise to A for life and after his decease to his then surviving heirs in fee, it was held that A took a fee simple under the rule in Shelley's Case. *Hiester v. Yerger*, 31 Atl. Rep. 122 (Penn.). In a devise to A for life and then to his oldest son then living, and if he have no son living at the time of his death, then to the heirs of A, it was held that the rule in Shelley's Case applied. *Eby v. Shank*, 46 Atl. Rep. 496 (Penn.); *Brinton v. Martin*, 47 Atl. Rep. 841 (Penn.). In a limitation to A for life, and to his heirs to the third generation, then the land to be sold and divided among the heirs, A takes a fee simple. The restraint on alienation implied in the above is void. *Stigers v. Dinsmore*, 44 Atl. Rep. 550 (Penn.). Where the heir is to take for life only, the rule in Shelley's Case does not apply. *Pedder v. Hunt*, 18 Q. B. D. 571, 572.

“inheritance”; that is to say, the heirs or heirs of the body take by descent and not by purchase. Thus, for a simple illustration: to A for life, remainder to his heirs; or to A for life, remainder to the heirs of his body. In the first of these cases, A takes a fee simple; in the latter he takes an estate tail; and the heirs or heirs of the body do not take at all as purchasers, although the gift is so expressed to them; but they take by descent from their ancestor, A. Another illustration is: to A and the heirs of his body, remainder to his heirs. Here A takes an estate tail with remainder to himself in fee simple; and thus again, here the heirs take by descent and not by purchase. This latter form we shall consider more fully later.

The subject of the rule in Shelley’s Case has been elaborately considered by the House of Lords in *Van Grutten v. Foxwell*,<sup>1</sup> and no case has been so elaborately considered for many a year by the House of Lords as this case, with the exception of the late tort case of *Allen v. Flood*. In this case of *Van Grutten v. Foxwell*, the sound principle is reaffirmed that the rule in Shelley’s Case is a rule of law, or, in the quaint language of Shelley’s Case, a rule in law, and that it is not a rule of construction.

The origin of the rule in Shelley’s Case is lost in a remote antiquity. Five different theories have been advanced by which to account for its origin. To state it simply, the question is: Why in the case of a limitation to A for life, remainder to his heirs, does A take a fee simple in possession? In other words: Why is this the same as a limitation to A and his heirs?

First, it was common in the reign of Henry III. for fathers to make conveyances to the eldest son for the purpose of depriving the lord of certain of his fruits of tenure. We have already referred to some of these fruits in a recent chapter. If, then, a tenant holding by knight service should convey to

<sup>1</sup> *Van Grutten v. Foxwell* (1897), App. Cas. 658.



his eldest son a fee simple, thereby making the son take as a purchaser, the son, being under age, thereafter at the death of his father would not be liable to wardship, because he held by purchase and not by descent. Now, the Statute of Marlebridge (52 Henry III.) was passed to defeat this, which was called collusion; and the first of these theories concerning the origin of the rule in Shelley's Case is that it was a part of the policy which produced the Statute of Marlebridge to hold that in the case of a limitation to A for life, remainder to his heirs, the heirs should not be allowed to take by purchase, but that they must take by descent.<sup>1</sup>

The second theory is that of Mr. Williams. We have considered the power of alienation as against the lord in connection with the charter of 1217 and the statute of *Quia Emptores*; and in connection with that we mentioned that in the reign of Henry III. the power of alienation against the heir was obtained. Therefore there was a time when in a limitation to A and his heirs the heir was a purchaser, and of course his consent had to be obtained to the alienation of the fee, and A had but a life estate. The power of alienation against the heir was accomplished, without any legislation, in the reign of Henry III. Mr. Williams' theory is that before this authority was acquired the courts saw no difference between a gift to A for life, remainder to his heirs, and a gift to A and his heirs. Hence the rule in Shelley's Case.<sup>2</sup>

The third theory is that of abeyance. The common law hates an abeyance. It is very shocking to the common-law mind that the inheritance should ever be in abeyance. Now, in a gift to A for life, remainder to his heirs, the grantor has given away the inheritance, but since A has no heirs while he lives, the inheritance would have to be in abeyance, because though given away there is no one to take it; and this must be so unless A himself can take it. Hence, the rule in Shelley's

<sup>1</sup> 1 Preston on Estates, 295 *et seq.* See further, Co. Litt. 78 a.

<sup>2</sup> Williams, R. P. 254, 255. See further, 264, note.

Case.<sup>1</sup> It will not do to say that the rule in Shelley's Case turns upon the fact that the limitation to the heirs is a contingent remainder. It might be argued, since contingent remainders were at the mercy of the tenant for life until protected by modern statutes, that, therefore, A would take a fee simple, because he could defeat the estate of his heirs; but the contingent remainder first makes its appearance so late as the reign of Henry VI.<sup>2</sup> Therefore, there can be no argument in respect to the contingent remainder.

The fourth theory is that the rule in Shelley's Case gets the property into the market one generation earlier, for if A takes a fee simple in possession the property is immediately marketable, and no doubt it is the fact that it gets the property into the market one generation earlier,<sup>3</sup> which has caused the rule in Shelley's Case to hold its own down through the ages; for it still obtains in a considerable number of states in the United States, and is in full operation in England.

The fifth theory is that advanced by Sir Howard Elphinstone and others, in their edition of Goodeve on Real Property (4th edition, 1897, page 239), and we think that it may be stated in the following form: The only way in which two or more persons can at the common law take one estate as purchasers is to take together as joint tenants or tenants in common. Significance must be given to the plurality of the word "heirs." It is not intended that they shall take together as joint tenants, or tenants in common. Therefore, they cannot take as purchasers. Hence, they must take by descent. Therefore, the rule in Shelley's Case. To this it may be replied that in a limitation to the heirs of the body of A, the heirs take as purchasers; but that the descent among them is the same as though they took by descent, as we have in a previous chapter shown. It is to be observed that we are here

<sup>1</sup> Fearne on Rems. 85.

<sup>2</sup> Williams, R. P. 263, 264.

<sup>3</sup> Fearne on Rems. § 85; *Evans v. Evans* (1892), 2 Ch. 187-189. See also *In re Parry and Daggs*, 31 Ch. Div. 134.

dealing with the rule in Shelley's Case, and therefore with limitations to the heirs of a living person. Now, no limitation can be made at common law to the heirs, or to the heirs of the body, of a living person, except by way of contingent remainder, because that would be to create a freehold to begin *in futuro*; and this matter of the contingent remainder we shall consider later. As to the above proposition that the heirs of the body take as purchasers, but that the descent among them is the same as though they took by descent, there is the John de Mandevile Case.<sup>1</sup> It was a conveyance to the heirs of the body of a deceased person. The conveyance was to Roberge and to the heirs of John de Mandevile on her body begotten. The two children of the marriage were Robert and Maude. Robert entered and died without issue. Maude was allowed to take as the heir of her brother Robert, because she could have no other writ than the one she brought. But, it is not to be supposed that Robert constituted a new stock of descent, which would have been a material point had the matter of the half-blood come in. The case has always been regarded as very peculiar, and it turns upon the fact that she had to take as the heir of her brother in order to recover the land. But any limitation to the heirs of the body of A has no application to the question we are considering, because this is a form which grew up under De Donis. Now, the rule in Shelley's Case is older than the Statute De Donis; and we have no knowledge that any such form existed under the fee simple conditional.

Turning now to a limitation to A for life, remainder to the heirs of B, and assuming B to be a living person, here is a contingent remainder which will fail unless A survives B. Upon the death of B, A surviving, the heir of B takes a vested remainder. Now, two or more persons do not here take

<sup>1</sup> Mandevile's Case, stated in Co. Litt. 26 b; Fearn on Rems. 84, note; Moore v. Simkin, 31 Ch. Div. 95; Butler's note 152 to Co. Litt. 26 b; 1 Preston on Estates, 280-282. See further 2 Jarman on Wills, 62.

as purchasers, but only one heir, and we will call him X. The persons entitled to take by descent are the heirs of X, who we assume, has entered at the death of A; and if the element of the half-blood, which we have explained in a previous chapter, comes in, these are not the same as the heirs of B. And at this point the real difficulty with the above explanation of the origin of the rule in Shelley's Case appears. For it may be said if X can take as a purchaser, and make a new stock of descent, why may not the heir of A do the same in a limitation to A for life, remainder to his heirs? The only answer we can think of to this difficulty is, that such a case has to be at the common law by way of contingent remainder, and that there were no contingent remainders when the rule in Shelley's Case began; for that the contingent remainder first made its appearance so late as the reign of Henry VI.<sup>1</sup> Were it not for the fact that the contingent remainder did not exist when the rule in Shelley's Case became a rule of law, we should be met with the difficulty, as above pointed out, that two or more persons may, at the common law, take one estate, and yet not take together as joint tenants or tenants in common. So that, in a limitation to A for life, remainder to his heirs, X, the heir of A, may take, and make himself a new stock of descent, and after him his heir may take, and that heir may not be the heir of A; thus that these different persons may take one estate, and not by descent under A, and yet not be joint tenants or tenants in common; and the result is the same, even if the element of the half-blood does not come in.

We have seen above that under the rule in Shelley's Case the ancestor takes the estate of inheritance himself. Sometimes there is an intermediate limitation, an intervening limitation, between the limitation to the ancestor and the limitation to his heirs. If this intervening limitation be a vested estate, the ancestor is regarded as having two estates practically, the

<sup>1</sup> Williams, R. P. 263, 264.

one in possession, the other in remainder, and upon the intervening limitation ceasing, the two estates will close, come together, so that he will have the inheritance in possession. Suppose the intervening limitation to be contingent, he then has but one estate. But if that contingent estate becomes vested, his particular estate and his remainder will open and stay open until the intermediate limitation has ceased. But the power of the ancestor to convey the inheritance is not affected by the intervening limitation, other than this, that he cannot give his grantee any greater rights than he possesses himself.<sup>1</sup> The remainder may be a contingent remainder; thus, to A for life, and if he survive B, then to the heirs of A. This remainder, by the rule in Shelley's Case, is to A and his heirs. A now has an estate for life in possession, and a contingent remainder in fee simple. If B survive him, that is the end of his estate. On the other hand, if he survive B, A has a fee simple in possession, for his contingent remainder in fee simple has taken effect in possession.<sup>2</sup>

The rule in Shelley's Case applies to equitable estates as well as to legal ones. But both estates, that to the ancestor and that to the heirs, or heirs of the body, must be legal, or both of them must be equitable. If one be legal and the other equitable, the rule in Shelley's Case cannot apply.<sup>3</sup> The difficulty always is to decide whether the estate limited in terms to the heirs or heirs of the body be legal or equitable; for whenever the question arises the estate limited to the ancestor is always equitable. In *Van Grutten v. Foxwell*,<sup>4</sup>

<sup>1</sup> 2 Wash. R. P. 271, 272; 4 Kent's Com. 210.

<sup>2</sup> 2 Wash. R. P. 271, 272; 4 Kent's Com. 210.

<sup>3</sup> *Richardson v. Harrison*, 16 Q. B. D. 85; *Van Grutten v. Foxwell* (1897), App. Cas. 658; *Tudor's Lead. Cas.* (3d ed.) 602, 623; *Howard v. Trustees*, 41 Atl. Rep. 156 (Md.); *Glover v. Coudell*, 45 N. E. Rep. 180 (Ill.); *Cowing v. Dodge*, 35 Atl. Rep. 309 (R. I.); *Durbin v. Redman*, 40 N. E. Rep. 133 (Ind.); *Mercer v. Safe Company*, 45 Atl. Rep. 865 (Md.); *In re Eshbach's Estates*, 46 Atl. Rep. 905 (Penn.).

<sup>4</sup> *Van Grutten v. Foxwell* (1897), App. Cas. 658; see further, *Matling v. Matling*, 31 Atl. Rep. 28, 29 (N. J. Ch.); *Greene v. Huntington*, 46 Atl. Rep. 883 (Ct.). For another late case in which the limitation over

the trustees took a fee simple (see pp. 664, 665). There was a provision that the trustees should convey the reversion in fee to the heirs of the tenant in tail at a particular time; and thus both estates, that to the tenant in tail and that to the heirs, were held to be equitable, because the trustees had to retain the legal estate after the death of the first tenant in tail (664, 665, 679, see pp. 687, 688); and therefore the rule in Shelley's Case was applied.

In a limitation to A during widowhood, remainder to the heirs of her body, the rule in Shelley's Case is applied. She has the estate tail in remainder, and her life estate merges in the inheritance, and she thus has an estate tail in possession, so that her life estate is lost, and she does not lose the estate by marrying.<sup>1</sup>

The function of the rule in Shelley's Case is to give the remainder to the ancestor himself. Thus, to A for life, remainder to his heirs. The rule in Shelley's Case makes this read as if it were to A for life, remainder to him and his heirs. The rule in Shelley's Case has then fulfilled its entire office. What next takes place is merger. A's life estate merges in the inheritance, and A has an estate in fee simple in possession. Now, while the rule in Shelley's Case is a rule of the common law, and while merger is a principle of the common law, yet it is unnecessary to make the merger a part of the function of the rule in Shelley's Case, because the doctrine of merger is of broader operation in the common law.<sup>2</sup> Take the case of a limitation to A and B during the life of C,

to the heirs, or heirs of the body, was held to be equitable, see *Richardson v. Harrison*, 16 Q. B. D. 85; for late cases in which the limitation over to the heirs or heirs of the body was held to be a legal estate, so that the rule in Shelley's Case did not apply, see *In re Eshbach's Estates*, 46 Atl. Rep. 905 (Penn.); *Mercer v. Safe Co.*, 45 Atl. Rep. 865 (Md.).

<sup>1</sup> Tudor's Lead. Cas. 603, 604; 1 Preston on Estates, 313, 314, 330, 332; Challis, R. P. 132, 133; Fearne on Rems. 31, 32, 202, note.

<sup>2</sup> 1 Hayes on Conv. (5th ed.) 542-546, cited in 5 Gray's Cases on Prop. 91; Challis, R. P. 124; 1 Preston on Estates, 266, 267; Van Grutten v. Foxwell (1897), App. Cas. 668, 669.

remainder to the heirs of A. A marries, C dies, A dies, his widow surviving; she is entitled to dower, for at the time of A's death he had full and entire possession of the land in fee simple. Now, the rule in Shelley's Case had fully performed its function as soon as the limitation took effect. It did this by giving the remainder in fee to A himself. Upon the death of C, the intermediate estate of B terminated, so that the particular estate of A, *per autre vie*, itself terminated, and we find A in full possession of a fee simple estate; but there is no merger here, and yet the rule in Shelley's Case has fully operated. Now, here is a case, alluded to shortly above, in which there is a vested intermediate limitation, so that, while that intermediate limitation to B lasts, A has practically two estates; and while the books tell us that he is in possession of the estate of inheritance from the outset, yet they also tell us that he is only in such possession *sub modo*, which means *quasi*, or sort of. The result is that had A died while C was still alive, his widow would not have been entitled to dower, and the death of C was of importance only in getting rid of the intermediate estate of B. Now, let us suppose that A had died before C, the rule in Shelley's Case would have operated and have performed its entire function from the outset; but here again there would be no merger, for the death of A put an end to his life estate.<sup>1</sup> Doubtless, if it were to A for the life of C, remainder to the heirs of A, A's life estate would instantly merge in his estate of inheritance. But so far as the rule in Shelley's Case is concerned, it has in each case performed its entire function by giving the remainder to A himself. If there be a limitation to A and the heirs of his body, remainder to the heirs of A, the rule in Shelley's

<sup>1</sup> Tudor's Lead. Cas. (3d ed.) 601, 603; Perkins' Profitable Book, § 337; *In re Mitchell*, *Moore v. Moore* (1892), 2 Ch. 98, 99; Fearne on Rems. 31, 36, 202, note; 1 Preston on Estates, 313-316, 319, 323, 336-341; Smith's Essay, §§ 411-415; 1 Wash. R. P. 78, 407; *Wiscot's Case*, 2 Rep. 61 a, and note a; 3 Preston on Conv. 388; 2 Preston on Estates, 443, 444.

Case applies and gives the remainder to A himself in fee simple. Yet, there is no merger, but the rule in Shelley's Case has had its full operation.<sup>1</sup> The reason that there is no merger is because of the rule of law, already pointed out in a previous chapter, that if a remainder in fee simple be limited to the tenant in tail, or if the tenant in tail come to own the remainder or the reversion, there is no merger. This is according to the policy of De Donis, which is to preserve the estate tail; and notwithstanding the vicissitudes through which the estate tail has passed since the date of De Donis (1285), which vicissitudes we have sketched in a previous chapter, this principle of De Donis for the preservation of estates tail still remains the law.

In a deed, the word "heirs" and the words "heirs of the body" are words of strict limitation, and are requisite to make the rule in Shelley's Case apply, except that there may be some equivalent for the word "body." But, though they are words of strict limitation also in a will, yet they are not indispensable in a will in order for the rule in Shelley's Case to be applied. For instance, the word "sons," and the word "children," if found in a will, may be taken to be sufficient to cause the application of the rule in Shelley's Case. But it must appear pretty plainly in the will that the words were intended to be used as words of limitation. The word "issue" in a will is very much stronger as a word of limitation than the word "sons," or the word "children"; and there are more or less cases in which the rule in Shelley's Case has been applied when the limitation over in the will was to the issue.<sup>2</sup>

<sup>1</sup> Wiscot's Case, 2 Rep. 61 a; 3 Preston on Conv. 345, 395; Fearn on Rems. 35; 1 Preston on Estates, 339 (citing Fearn on Rems. 35).

<sup>2</sup> Tudor's Lead. Cas. (3d ed.) 608, 609, 615-622, 717, 752, 753; Wells v. Ritter, 3 Whart. 217-219; Buffar v. Bradford, 2 Atkins, 222; Sheeley v. Heidhammer, 37 Atl. Rep. 939 (Penn.); Matling v. Matling, 39 Atl. Rep. 203 (N. J.); Lewis v. Bryce, 41 Atl. Rep. 275 (Penn.); Potts v. Kline, 34 Atl. Rep. 191 (Penn.); Jamison v. McWhorter, 31 Atl. Rep. 518 (Del.); Brinton v. Martin, 47 Atl. Rep. 841 (Penn.).



The first great rule of the remainder applies to limitations governed by the rule in Shelley's Case ; which rule is, as heretofore shown, that the particular estate and the remainder must be created at the same time, that is, by the same instrument. But, contrary to the rule governing remainders, if the ancestor dies before the testator, so that the estate limited to him lapses, the limitation over to the heirs, or heirs of the body is defeated.<sup>1</sup> Now, a remainder is not defeated by the lapsing of the particular estate, but on the contrary the possession may be accelerated. Thus, in a devise to A for life, remainder to B and his heirs, if A dies before the testator, B, upon the testator's death, comes into the immediate possession of the estate.

The rule in Shelley's Case is applied with great rigor, and it will be applied in an appropriate case even though the deed or will contain an express direction to the contrary.<sup>2</sup> The books contain many judicial opinions in which the subject of general and particular intention is discussed, and the use of these words has given rise to a great deal of confusion. The theory involved in these words is that the general intention overrides the particular intention, and the cases are those in which highly complicated language is found, which it has been argued qualifies the words of limitation, so as to take the case out of the operation of the rule in Shelley's Case ; and sometimes a multiplicity of words has had that effect. But the doctrine of general and particular intention is that the use of the appropriate words indicates a general intention that the rule in Shelley's Case shall apply, and that the particular intention of the testator or grantor that it shall not apply must give way to the general intention. Now, this putting the rule in Shelley's Case upon the theory of intention is

<sup>1</sup> 1 Wash. R. P. 79; Tied. R. P. § 434; 2 Wash. R. P. 269; Tudor's Lead. Cas. (3d ed.) 601.

<sup>2</sup> Van Grutten v. Foxwell (1897), App. Cas. 663, 680, 685; Hageman v. Hageman, 29 Ill. 164; s. c. 7 Am. Probate Rep. 60, 63 and note; Tudor's Lead. Cas. (3d ed.) pp. 606 *et seq.*

entirely erroneous, and has been completely exploded by the great case of *Van Grutten v. Foxwell*; and that case reaffirms the doctrine of Shelley's Case itself, that the rule in Shelley's Case is not a rule of construction, that it does not turn upon the intention of the testator or grantor, but that it is a rule of law, and must be applied when the words of limitation require its application; and the principle is that the rule in Shelley's Case is intended to disappoint the intention, to defeat the intention.<sup>1</sup> Yet, even the words "heirs" or "heirs of the body" may be used and the rule in Shelley's Case not be applied, and that is when these words are intended to designate an individual person or a particular class of persons.<sup>2</sup>

The rule in Shelley's Case has been abolished in some of the states of this country, but is still retained in some of the states; and in some of the states it has been modified. It is very commonly stated that it has been abolished in Massachusetts, but this is not true. But it has been very materially modified in Massachusetts.<sup>3</sup>

<sup>1</sup> *Van Grutten v. Foxwell* (1897), App. Cas. 662-664, 668, 669, 671, 684.

<sup>2</sup> *Van Grutten v. Foxwell* (1897), App. Cas. 663, 672, 675-677, 684, 685; *Granger v. Granger*, 44 N. E. Rep. 189 (Ind.); s. c. 46 N. E. Rep. 80 (Ind.); *McCann v. McCann*, 47 Atl. Rep. 743 (Penn.).

<sup>3</sup> The form in which the Massachusetts statutes now stand in the Revised Laws is as follows (Mass. Rev. Laws, ch. 134, § 4): "If land is granted or devised to a person and after his death to his heirs in fee, however the grant or devise is expressed, an estate for life only shall vest in such first taker, and a remainder in fee simple in his heirs."

Chief Justice Shaw, in *Barton v. Bigelow*, 4 Gray, 356, 357, speaks of the rule in Shelley's Case as being "to some extent" reversed by the Massachusetts statute.

Suppose that there be a limitation to A for life, with a remainder to the heirs of his body, we have a *dictum* in *Richardson v. Wheatland*, 7 Met. 172, that the statute will apply, and that A will take a life estate with a remainder in fee simple to the heirs of his body. In *Trumbull v. Trumbull*, 149 Mass. 200, there was a devise to A for life and his issue forever. The statute was applied because of the express gift to A for his life, and it was held further that the issue took under the statute a remainder in fee simple. Any limitation by will of real and personal property to the testator's widow "for her sole use and comfort during her

If land be given to two persons and the heirs of their two bodies, and if they be persons who may possibly intermarry, they have an estate in tail special. They are, therefore, entitled equally so long as they both live, the survivor taking the whole so long as he lives; and upon his decease the heirs of their bodies will succeed by descent, provided they have intermarried and have had a child.<sup>1</sup> And so if the gift be to hus-

natural life and to her heirs and assigns forever," as the beneficiary was the testator's own widow whom he would be likely especially to favor, it was held that she took a fee simple. But it is clear that it was not by virtue of the rule in Shelley's Case, but simply as a matter of construction of the above language in a will in which the courts allow themselves great latitude as a general rule. It is evident that the statute had no application. *Kendall v. Clapp*, 163 Mass. 69. In *Sims v. Pierce*, 157 Mass. 52, in a limitation to A for life and to his heirs after him, it was held that, under the above statute of Massachusetts, A took a life estate, and that his heirs took a remainder in fee.

Suppose, on the other hand, that there be a devise to the ancestor not for his life, but a devise to him in tail, we have here the case of *Weld v. Williams*, 13 Met. 493. The controversy in this case was whether the ancestor took a life estate or an estate tail, and it was held that he took an estate tail. There was a limitation over to his "children." Chief Justice Shaw, in delivering the opinion, says that the children took *per formam doni*, which means that they took by descent as heirs in tail. We have just above shown that the word "children" is sometimes a word of limitation in a will. If we were to stop here we should say that the rule in Shelley's Case was applied; in other words, that the statute was not applied. But this statement of Chief Justice Shaw is not in connection with his reference to the Massachusetts statute; so that we cannot be certain what the decision on the point would be. But there is a better reason for leaving the question still open. The tenant in tail had conveyed in fee simple by a deed in common form. We said in a note in a previous chapter, in which we considered the subject of the estate tail, that the deed in common form has taken the place of the common recovery in Massachusetts. The result is that the tenant in tail had created a fee simple by his deed, and that it was not material what estate the children took; for if they took a vested remainder, under the statute modifying the rule in Shelley's Case, the deed of the tenant in tail cut it off as effectually as if the children should take simply by descent as heirs in tail; for, of course, in that case, likewise, the deed would defeat their inheritance.

<sup>1</sup> *Williams*, R. P. 132, 133; *Chudleigh's Case*, 1 Rep. 114, 293; 10 *Harvard Law Rev.* 443; *Litt.* §§ 283, 284; *Co. Litt.* 30 a, 183 a; *Palmer v. Rich* (1897), 1 Ch. 140, 141; *Challis*, R. P. (2d ed.) 268, 269;

band and wife and the heirs of their two bodies, they take estates tail special. If the gift be to husband and wife for life, or be to a man and woman who may possibly intermarry, for their lives, with remainder to the heirs of their two bodies, the rule in Shelley's Case applies and they will take estates tail special.<sup>1</sup> In these cases of a limitation to two persons who may possibly intermarry, and the heirs of their two bodies, one of these persons may be the then wife or husband of another person.<sup>2</sup>

On the other hand, if lands be given to two persons and the heirs of their two bodies, and they be persons who cannot possibly intermarry, they are entitled jointly so long as they both live, the survivor taking the whole so long as he lives. On his decease, the property goes in equal parts to the heirs of the body of each, and there will be a tenancy in common. The rule in Shelley's Case here operates, and the heirs of the body take by descent. It is immaterial in this latter case whether the two persons be both men or both women, or a man and a woman; and there cannot be dower or curtesy in the estate of the one dying first, because there is an intervening life estate in possession.<sup>3</sup> And so if the gifts be to two persons for their lives, and they be persons who cannot possibly intermarry, with remainder to the heirs of their two bodies, they are entitled jointly so long as they both live, the survivor taking the whole so long as he lives. On his decease, the property goes in equal parts to the heirs of the body

2 Preston on Estates, 420, 426, 431, 437, 443, 444; 1 Preston on Estates, 336-341, 345; Smith's Essay, §§ 411-415; Fearne on Rems. 31, 36; 1 Wash. R. P. 78; Wiscot's Case, 2 Rep. 61 a, and note A; 3 Preston on Conv. 388.

<sup>1</sup> Smith's Essay, § 413; 1 Wash. R. P. 78; Wiscot's Case, 2 Rep. 61 a, and note A; 3 Preston on Conv. 388; 1 Preston on Estates, 330 *et seq.*, 335 *et seq.*, 339, 344, 345.

<sup>2</sup> 13 Law Quart. Rev. 4.

<sup>3</sup> See the authorities in note 1, page 197, above; Smith's Essay, §§ 407-412; Litt. §§ 280, 281, 283, 286; 2 Black. Com. 181, 192 and notes 4 and 7.

of each, and there will be a tenancy in common. The rule in Shelley's Case here operates, and the heirs of the body take by descent.<sup>1</sup>

In a limitation to a wife for life, remainder to the heirs of the body of the husband and wife, the heirs take as purchasers. And conversely, if the limitation be to the husband for life, etc., etc. The heirs would also take as purchasers, if the limitation were to the husband, or if it were to the wife, and the heirs of the body of the husband and wife.<sup>2</sup> And Fearné,<sup>3</sup> in connection with limitations to husband and wife, says: "though every person may so far be supposed to carry his own heirs, etc., in himself during his life, as that a limitation to them where he takes a preceding freehold, may vest in himself; yet no person can be supposed to include in himself the heirs, etc., of himself and of somebody else." But if there be a gift to A for life, remainder to the heirs of the body of A and B., and they are not husband and wife, nor may possibly intermarry, the gift will be construed, as to one half of the land, to give the inheritance to A under the rule in Shelley's Case; and as to the other half, to give a contingent remainder to the heirs of the body of B. It is a contingent remainder, because if B were to survive A, he would have no heirs at A's death, under the principle of *nemo est hæres viventis*.<sup>4</sup>

If there be a gift to A and B, whether they be husband and wife, or be persons who cannot possibly intermarry, with remainder over to the heirs of the body of one of them, the rule in Shelley's Case operates, and gives the inheritance to that one to whose heirs of the body the limitation over is made; and, as shown shortly above, the estate of inheritance is said

<sup>1</sup> 1 Preston on Estates, 329, 343-345.

<sup>2</sup> 2 Wash. R. P. 270; 1 Wash. R. P. 78, 79; Fearné on Rems. 37, 38, 65; Tudor's Lead. Cas. (3d ed.) 605; Smith's Essay, § 416; 2 Preston on Estates, 441, 442; 1 Preston on Estates, 334, 335, 358, 361; Mudge v. Hammill, 43 Atl. Rep. 544 (R. I.).

<sup>3</sup> Fearné on Rems. 38.

<sup>4</sup> 1 Preston on Estates, 334; Tudor's Lead. Cas. (3d ed.) 605.

to be executed in possession *sub modo*, that is, *quasi*, sort of, because of the existence of the intermediate limitation for life made to the other of them.<sup>1</sup>

<sup>1</sup> Smith's Essay, §§ 411-415; Fearne on Rems. 31, 36; 1 Wash. R. P. 78; Wiscot's Case, 2 Rep. 61 a, and note A; 3 Preston on Conv. 388; 1 Preston on Estates, 336-341; 2 Preston on Estates, 443, 444.

## CHAPTER XVII.

## THE RULE IN WILD'S CASE.

WILD'S CASE, 6 Coke's Rep. 16 b, is one of Tudor's Leading Cases, and the rule in that case laid down is that if there be in a will a limitation of real estate to A and to his children or issues, A takes an estate tail, provided that there be no children or issue at the time that the will is made; and that A and the children or issue take joint life estates, if there be children or issue at the time that the will is made. The above language comprehends two other forms: "to A and his children; to A and his issue." The case is peculiar as referring to the time when the will is made, and not to the time when the will takes effect, namely, at the time of the testator's death. The reason for the rule in Wild's Case is therein stated by Lord Coke to be that it was the deviser's intent that the children or issue should take; but if not in being when the will is made, they cannot take as immediate devisees; and they cannot take as remaindermen, because that was not the deviser's intent, because the gift is immediate. By giving the ancestor an estate tail, the interests of the children or issue are given effect to.<sup>1</sup>

In *Nightingale v. Burrill*,<sup>2</sup> Wild's Case was regarded as applicable; and the language of the will was "to A and her children." At the time when the will was made A had no children. In *Trumbull v. Trumbull*,<sup>3</sup> the limitation, by will,

<sup>1</sup> Wild's Case, 6 Coke's Rep. 16 b. See also Tudor's Lead. Cas. (3d ed.) 672; *Sisson v. Seabury*, 1 Sumner, 241.

<sup>2</sup> *Nightingale v. Burrill*, 15 Pick. 114. See further, *Brown v. Thorndike*, 15 Pick. 400; *Wheatland v. Dodge*, 10 Met. 504; *Canedy v. Has-kins*, 13 Met. 402, 403; *Malcolm v. Malcolm*, 3 Cush. 478.

<sup>3</sup> *Trumbull v. Trumbull*, 149 Mass. 200.

was "to A for life and his issue forever." This was held to give A a life estate, with remainder to the issue in fee simple under the Massachusetts statute, which has modified the rule in Shelley's Case. It does not appear that any issue of A had been born at the time when the will took effect.

In some cases Wild's Case has been followed in part, when there were children born at the time the will was made, and the ancestor and the children in such cases have been held to take as tenants in common in fee simple.<sup>1</sup> The rule in Wild's Case is flexible, and will yield to a contrary intention appearing in the will.<sup>2</sup>

<sup>1</sup> *Allen v. Hoyt*, 5 Met. 328; *Annable v. Patch*, 3 Pick. 363; *Loyless v. Blackshear*, 43 Ga. 327; *Gordon v. Jackson*, 43 Atl. Rep. 98 (N. J. Ch.); *Jamison v. McWhorter*, 31 Atl. Rep. 517 (Del.); *Mitchell v. Mitchell*, 47 Atl. Rep. 325 (Conn.); 2 Shars. & Budd, 272.

<sup>2</sup> *Tudor's Lead. Cas.* (3d ed.) 673 *et seq.* See *Hatfield v. Sohier*, 114 Mass. 48; *Sisson v. Seabury*, 1 Sumner, 242.



## CHAPTER XVIII.

FAILURE OF ISSUE CLAUSE AND FAILURE OF  
HEIRS CLAUSE.

WE will now take up the failure of issue clause and the failure of heirs clause. The simplest form of the failure of issue clause is, to A and his heirs, and if he die without issue, then to B and his heirs. Now the failure of issue clause may import a definite failure of issue, or it may import an indefinite failure of issue. The question as to which of these two it shall import is a question of construction. We saw in a recent chapter upon the rule in Shelley's Case that that is a rule of law and not a rule of construction; but whether the failure of issue clause shall be taken to import a definite or an indefinite failure of issue is always a question of construction. The element of presumption, namely, which it shall be presumed to import, we shall consider later. A definite failure of issue is a failure of issue referred to the time of the death of A above. An indefinite failure of issue is not referred to any particular time. There is still a third way of looking at the subject which we shall consider later. If the construction be that of a definite failure, then, when A comes to die, if he has left any issue him surviving, B can never take. If, on the other hand, no issue survive him, B immediately takes. If the construction be that of an indefinite failure of issue, then B will take after the death of A, whenever, if ever, A's issue shall become extinct, provided that the rule against perpetuities does not prevent. The rule against perpetuities, briefly stated, is that any interest is void as too remote which by any possibility may not become vested in interest or in possession within the perpetuity period. The perpetuity period is meas-

ured by lives in being at the death of the testator, or at the time of the execution and delivery of the deed, and twenty-one years and nine months added. Now, in the case of the indefinite failure above, the interest of B may vest at some indefinitely remote time. It is, therefore, void as too remote, because of the rule against perpetuities, unless the estate of A can be cut down by the indefinite failure of issue clause to an estate tail, in which case B will take a good vested remainder; for the rule against perpetuities never makes any remainder expectant upon an estate tail to be too remote. One of the reasons why the estate of A may be cut down to an estate tail is because the indefinite failure of issue provision implies that the issue are to take in succession after A. In applying the rule against perpetuities, we do not inquire whether the interest has in fact vested in due season, for that is immaterial. But we look at the deed or will, and see whether we are to construe the interest so that by any possibility it may vest too remotely. If so it is *ab initio* void as too remote. And so, too, in dealing with the failure of issue clause, we never look to the event. It is always a question of construction of the deed or will. We have to read the deed or will, and from its four corners and what is contained within, decide whether the clause shall be taken to import a definite or an indefinite failure of issue. There may be a limitation to A and his heirs, and if B, a stranger, die without issue, then to C and his heirs. When the failure of issue is that of a stranger, the construction is always that of an indefinite failure of issue. And since A's estate, manifestly, cannot be cut down to an estate tail by the failure of the issue of another man, the limitation to C is void, as too remote.<sup>1</sup>

We have seen that if there be a limitation to A and his heirs, and if he die without issue, then to B and his heirs, and if this be taken to import an indefinite failure of issue, A's estate may be cut down to an estate tail, and B will take a

<sup>1</sup> Tudor's Lead. Cas. (3d ed.) 466.

good vested remainder. Estates tail of this character not being given in express words, are raised by implication of law, and the general rule is that estates tail by implication are found only in limitations to uses, and in wills.<sup>1</sup> In a previous chapter we found what is really an exception to this principle, in the case of a common-law limitation to A, and if he die without heirs of his body, then to revert or to remain over, and that this gave A an estate tail.<sup>2</sup> It has been said by an eminent judge that this was permissible even in a common-law conveyance, because it was a necessary implication in that case that the words would bear no other interpretation.<sup>3</sup> And now we must distinguish between deeds and wills. The formula of an estate tail is "heirs of the body." Here are two words, "heirs" and "body," and in a deed the word "heirs" is indispensable. But there may be an equivalent for the word "body," even in a deed. But the word "issue" is not an equivalent. Therefore, the failure of the issue clause will not work in a deed. We must have the word "body," or its equivalent. The word "flesh" is an equivalent. Thus, in a deed to A and his heirs, if he should have heirs of his flesh, and if he should have no heirs of his flesh, to revert to the donor, A will take an estate tail.<sup>4</sup> In the case of *Abraham v. Twigg*,<sup>5</sup> there was a feoffment to the use of A, and to his heirs males lawfully engendered, and for default of such issue, over. It was held that the word "issue" was not the equivalent of the word "body," and that A took a fee simple. In a previous chapter we have said that, while in a will the words "heirs male" will give an estate tail male, they will not have this effect in a deed, because of the absence of the word "body" or its equiva-

<sup>1</sup> 1 Preston on Estates, 190; Tudor's Lead. Cas. (3d ed.) 640-642; *Idle v. Cook*, 2 Lord Raymond, 1152; 2 Preston on Estates, 474, 475, 486, 487, 521-528.

<sup>2</sup> Perkins' Profitable Book, § 173; 2 Preston on Estates, 474, 475, 486, 487.

<sup>3</sup> Lord Holt in *Idle v. Cook*, 2 Lord Raymond, 1152.

<sup>4</sup> 2 Preston on Estates, 500, 508, 524 *et seq.*

<sup>5</sup> *Abraham v. Twigg*, Cro. Eliz. 478.

lent; and that the grantee will take a fee simple, and that the word "male" is rejected as surplusage, and here it so appears. In *Beresford's Case*,<sup>1</sup> the deed was to the use of A, "and of the heirs males of the said A," "lawfully begotten," "and in default of such issue," over. It was held that A took an estate tail. This was because of the word "of" in the clause "heirs males of the said A." The word "of" is taken to import out of the said A, that is, issuing from the said A, that is, from the body of the said A. The distinction between *Abraham v. Twigg* and this case is in the subtle use of language. In *Abraham v. Twigg* it is to A and *his* heirs males. We notice both in *Abraham v. Twigg*, and in *Beresford's Case*, a manifest intention to create an estate tail, not only by the provision that the estate shall go over upon a failure of issue, but by the provision that it shall be the failure of issue lawfully engendered, or lawfully begotten. It has been said by an eminent judge that *Beresford's Case* would not be followed unless the language were identical or nearly so.<sup>2</sup> In *Hall v. Cressey*,<sup>3</sup> decided by the Supreme Court of Maine, there was a deed to A and his heirs, and if he should die without children, then over. It was held that A could not take an estate tail, because the word "children" is not the equivalent in a deed of the word "body." In *Morgan v. Morgan*,<sup>4</sup> the substantial features of the case were as follows: There was a deed by a man to the use of his eldest son A and his heirs, and if A should die without issue, then over to B, the second son and his heirs, and if both A and B should die without issue, then over to the other members of the family. It was held that A and B took estates tail. The decision is not law. Reliance is placed on the old case of *Fisher v. Wigg*.<sup>5</sup> In *Fisher v. Wigg*, it is stated that in the Year Book 19 Henry VI., pages 74 and 75,

<sup>1</sup> *Beresford's Case*, 7 Coke's Rep. 41 a.

<sup>2</sup> Willes, C. J., in *Goodwright v. Goodridge*, Willes' Reports, 374.

<sup>3</sup> *Hall v. Cressey*, 43 Atl. Rep. 118 (Me.).

<sup>4</sup> *Morgan v. Morgan*, 10 Eq. 99; s. c. 39 Law Jour. Ch. 493.

<sup>5</sup> *Fisher v. Wigg*, 1 P. Williams, 15.

such language was held to give an estate tail. But, on an examination of the Year Book, it appears that this is a mistake. The language of the Year Book is not "die without issue," but is "die without heir of the body." *Morgan v. Morgan* has been overruled in *Olivant v. Wright*,<sup>1</sup> but it requires consideration, as it is cited in the text-books as authority. If *Morgan v. Morgan* could be sustained, and we think it cannot be sustained, it would be upon the ground that the devolution of the estate according to the deed was within the immediate family of the settlor, grantor, and that an earnest attempt was made to create successive estates tail in that family line. So much for the subject of deeds. We shall hereafter speak exclusively of wills in dealing with the clauses we are now considering.

The particular in which we must discriminate between the failure of heirs clause and the failure of issue clause in a will of real estate is as follows: If there be a devise to A and his heirs, and if he die without heirs, then to B and his heirs; and if this be taken to import an indefinite failure of heirs, it will make a difference whether B is capable of being the heir of A or not, whereas there would be no such difference in a failure of issue clause. If B be a stranger to A, that is, as it is expressed in the books, not near enough in consanguinity to be the collateral heir of A, then the estate of A will not be cut down to an estate tail, and B will take an executory devise, which will be void as too remote, leaving A a fee simple absolute. If, on the other hand, B be so near in consanguinity to A, then the estate of A will be cut down to an estate tail, and B will have a vested remainder. The reason for this latter principle is that it would be absurd that B should take an executory devise upon the extinction of the heirs of A when B is himself the heir of A.<sup>2</sup> But in modern

<sup>1</sup> *Olivant v. Wright*, 9 Ch. Div. 646.

<sup>2</sup> *Fearne on Rems.* 466 and note, 467; *Tudor's Lead. Cas.* (3d ed.) 469, 718, 719; *Smith v. Scholtz*, 68 N. Y. 59; *Van Grutten v. Foxwell* (1897), App. Cas. 694; *Doblers' Appeal*, 64 Penn. State, 16; 2 Wash. R. P. 364.

times such clauses as these are held very often to import a definite failure, the tendency being to try to find such a construction, though frequently ineffectually; and modern statutes are very numerous, as will later be more fully considered, which serve to give a definite failure construction in lieu of an indefinite failure construction. Suppose, then, there be a devise of real estate to A and his heirs, and if he die without heirs, then over to B and his heirs, and that this be taken to import a definite failure, now in such a case the failure of heirs clause is the equivalent of the failure of issue clause, and as already shown in such a case, the failure of issue is to be referred to the time of the death of A. Should A then leave any issue him surviving, B can never take. Should A die without leaving issue him surviving, B will immediately take. This limitation over to B cannot be void as too remote, because it must go over, if ever, at the end of a life in being. It is, therefore, a good executory devise, being in a will,<sup>1</sup> and if it takes effect it cuts short A's determinable fee. It is, in other words, a conditional limitation, which we have explained when upon the subject of the contingent remainder.

It is said by Chief Justice Shaw in *Nightingale v. Burrill*,<sup>2</sup> a very leading case, in substance as follows: If there be in a will of real estate a gift to a person for life in plain words, or if a fee be given him in plain words, and from other parts of the will it appears to be the intention that his issue shall take in succession after him, the life estate in the one case will be raised to an estate tail, and the fee in the other case will be cut down to an estate tail, and that this will be the case if there be a failure of issue clause construed as indefinite. In this case the devise was to A and her children, and if she should die and leave no children, then over. It was held that A took an estate tail, the clause being construed as indefinite.

<sup>1</sup> *Durfee v. MacNeil*, 50 N. E. Rep. 721 (Ohio); *In re Cramer*, 63 N. E. Rep. 279 (N. Y.).

<sup>2</sup> *Nightingale v. Burrill*, 15 Pick. 112.

We have hitherto discussed the subject of the failure of issue clause from the standpoint of a limitation to a man and his heirs, accompanied by a provision that upon failure of his issue the estate should go over; but suppose that the gift be to a man expressly for his life with a failure of issue clause. At the common law, by which we mean when the matter has not been affected by statute, if there be a devise of real estate to A for life, with a failure of issue clause construed as indefinite, this raises an implied remainder in the issue, and the rule in Shelley's Case will apply, and A will take an estate tail.<sup>1</sup> In *Wheatland v. Dodge*<sup>2</sup> there was a devise of real estate to A, his children or grandchildren, with a failure of issue clause construed as indefinite. It was held that A took an estate tail. The ground of the decision as appears in *Hayward v. Howe*<sup>3</sup> is that the words "children" or "grandchildren" import that more than a life estate is given A, and that with the failure of issue clause construed as indefinite, A will take an estate tail without the help of the rule in Shelley's Case; and we think that the same explanation may be given of *Nightingale v. Burrill*, *supra*, in which the language is to A and her children. Now, in *Hayward v. Howe*<sup>4</sup> there was a

<sup>1</sup> 1 Leake, 182.

<sup>2</sup> *Wheatland v. Dodge*, 10 Met. 505.

<sup>3</sup> *Hayward v. Howe*, 12 Gray, 49-52.

<sup>4</sup> *Hayward v. Howe*, 12 Gray, 49, 50, 51, 52. There may be a question as to what would be the Massachusetts law in such a case as that above mentioned, in which the devise is to A expressly for life, with a failure of issue clause construed as indefinite, and no remainder limited to the issue, except, as above, by implication. Our own opinion is that the rule in Shelley's Case would be applied, and that the statute modifying the rule in Shelley's Case would not be applied. All the cases cited in *Trumbull v. Trumbull* (149 Mass. 200), in which the said statute was applied, are cases in which there was an express remainder over. And in *Trumbull v. Trumbull*, *supra*, there is an express remainder over to the issue, although not expressed in the usual form of limiting a remainder. Our opinion is for several reasons. First, it is an elementary principle that statutes in derogation of the common law are to be strictly construed; the courts do not intend to legislate, and will not stretch a statute in derogation of the common law beyond what the legislature has enacted. Then, again, see the language of Chief Justice Shaw in *Nightingale v.*

devise of real estate to A with a failure of issue clause construed as indefinite. Here the gift was not to A expressly for life, nor to A and his children. It was held that A took an estate tail and without the help of the rule in Shelley's Case, that the expression of the gift to A and a failure of issue clause are both *uno flatu*, all in one breath, and thus that the intention is manifested that A shall take an estate tail. In *Trumbull v. Trumbull*<sup>1</sup> the devise of real estate was to A for life and his issue forever. It was held that the Massachusetts statute, modifying the rule in Shelley's Case, applied, and that the failure of issue clause should be construed as definite.

The number of cases in which the failure of issue clause has been held to import an indefinite failure of issue is enormous. Probably there are more of them than of any other one class of cases in the entire body of property law. We will cite a few of the late cases in which the indefinite failure construction has been adopted, thereby conferring an estate tail.<sup>2</sup>

In a devise of real estate to A and his heirs, and if he die without issue then to B and his heirs, assuming that we have

Burrill, above mentioned, which we understand to be his understanding of the Massachusetts law. And in *Kendall v. Clapp* (163 Mass. 69), the court says that this statute applies only when there is a gift to the ancestor for life, with a remainder over to his heirs. See also *Sims v. Pierce*, 157 Mass. 52.

<sup>1</sup> *Trumbull v. Trumbull*, 149 Mass. 200.

<sup>2</sup> *Horton v. Upham*, 43 Atl. Rep. 492 (Conn.); *Prettyman v. Conway*, 32 Atl. Rep. 15 (Del.); *Beilstein v. Beilstein*, 45 Atl. Rep. 73 (Penn.); *Palethorp v. Palethorp*, 45 Atl. Rep. 322 (Penn.); *Stouch v. Zeigler*, 46 Atl. Rep. 486 (Penn.); *Brown v. Addison Gilbert Hospital*, 155 Mass. 323; *Holden v. Wells*, 31 Atl. Rep. 265 (R. I.); *Chesbro v. Palmer*, 36 Atl. Rep. 42 (Conn.); *Slade v. Patten*, 68 Me. 384; *Willey v. Haley*, 60 Me. 177; *Riggs v. Sally*, 15 Me. 408; *Hall v. Priest*, 6 Gray, 18; *Nightingale v. Burrill*, 15 Pick. 112; *Weld v. Williams*, 13 Met. 486; *Allen v. Trustees of Ashley School Fund*, 102 Mass. 262; *Albee v. Carpenter*, 12 Cush. 387, 388; *Hawley v. Northampton*, 8 Mass. 38, 39; *Malcolm v. Malcolm*, 3 Cush. 477 *et seq.*; *Terry v. Briggs*, 12 Met. 22; *Wheatland v. Dodge*, 10 Met. 502; *Parker v. Parker*, 5 Met. 134; *Patterson v. Madden*, 33 Atl. Rep. 51 (N. J.); *Hayward v. Howe*, 12 Gray, 49; *Canedy v. Haskins*, 13 Met. 401, 402; *Dorr v. Johnson*, 170 Mass. 542; *Fisk v. Keene*, 35 Me. 349.



an indefinite failure construction, two additional reasons have been given besides that already mentioned for cutting down A's estate to an estate tail and giving B a remainder. The first of these is a principle mentioned in a previous chapter, that the courts will always make an estate to be a remainder when they can do so.<sup>1</sup> The remainder is the old common-law future estate, and the courts always lean towards adopting it. Secondly, understanding that we are assuming that we have an indefinite failure clause, the limitation over would be void as too remote because of the rule against perpetuities. In other words, it would be a bad executory devise, a bad conditional limitation, were not the estate of the first taker cut down to an estate tail with remainder over; and thus, in order to save the limitation over, they make the devise to be an estate tail with remainder over.<sup>2</sup>

We have said shortly above that in dealing with the failure of issue clause, we would take up the matter of presumption, and here we say that the presumption is always in favor of the indefinite failure construction. We shall presently show that there is much legislation on this subject, and there is a very large class of cases in which explanatory language has been found in the will, having the effect to change the presumption and to make the clause to import a definite failure of issue. We shall soon consider some of these cases, but the courts have sustained the presumption in cases in which they declared that they would overrule the intention of the testator, for that he had used in the will technical words which must have their well known legal import, and that the indefinite failure construction must be adopted.<sup>3</sup>

<sup>1</sup> *Parker v. Parker*, 5 Met. 138; *Nightingale v. Burrill*, 15 Pick. 110; *Hall v. Priest*, 6 Gray, 20.

<sup>2</sup> *Tudor's Lead. Cas.* (3d ed.) 648.

<sup>3</sup> *Hall v. Priest*, 6 Gray, 22; *Weld v. Williams*, 13 Met. 493, 494; *Brown v. Addison Gilbert Hospital*, 155 Mass. 326; *Fisk v. Keene*, 35 Me. 354, 356; *Deering v. Adams*, 37 Me. 264; *Hamilton v. Wentworth*, 58 Me. 104; *Shaw v. Hussey*, 41 Me. 495; *Norton v. Barrett*, 22 Me. 257; *Holden v. Wells*, 31 Atl. Rep. 266 (R. I.).

When we have met with cases of wills in which the definite failure construction has been adopted, we have always found, in the absence of statute changing the construction, that other parts of the will, or the frame of the will, showed that the other construction would do violence to the valid and effectual purpose of the will;<sup>1</sup> and it is undoubtedly true that in a bald case, by which we mean a case in which there are no words to be found in the will explanatory of the failure of issue clause, the indefinite construction must be adopted.<sup>2</sup> But we shall later see that the will may contain matter which will change the presumption, and of the current cases in the reports, where the definite failure construction is adopted, very often it is because of a statute in that state, and the statute very often is not mentioned in the opinion of the court. Now, there is no doubt that there has been in modern times a strong disposition to construe the clause as definite, and this disposition has extended beyond the courts to the legislatures, and *vice versa*. This disposition on the part of the courts manifests itself, as we have above indicated, in laying hold of something or other in the will to produce a definite failure construction.

There is much legislation in the United States which has had the effect to change the presumption, and in England there is a statute to the same effect,<sup>3</sup> and such is the effect of the Massachusetts statute.<sup>4</sup> Now, it is not that the indefinite failure construction has been abrogated by such statutes, but

<sup>1</sup> *Simonds v. Simonds*, 112 Mass. 157, 161; *Schmaunz v. Goss*, 132 Mass. 141; *Wight v. Barry*, 7 Cush. 105; *Sears v. Russell*, 8 Gray, 92, 93; *Brightman v. Brightman*, 100 Mass. 238; *Hooper v. Bradbury*, 133 Mass. 304; *Sewall v. Roberts*, 115 Mass. 274; *Abbot v. Essex Co.*, 18 How. 202; s. c. 2 Curtis, C. C. 126; *Strain v. Sweeney*, 45 N. E. Rep. 201 (Ill.); *Brooks v. Kip*, 35 Atl. Rep. 658 (N. J. Ch.); *Trumbull v. Trumbull*, 149 Mass. 200.

<sup>2</sup> 2 Shars. & Budd, 492.

<sup>3</sup> St. 7 Wm. IV. and 1 Vict. ch. 26, § 29.

<sup>4</sup> The Massachusetts statute of 1888, ch. 273, provides that the failure of issue clause shall be taken to import a definite failure of issue "unless a contrary intention shall clearly appear in the instrument."

only that the presumption has been changed, and in order to apply the statutes it is necessary to know the law independently of the statutes.

The judges of late years have occasionally shown a disposition to ridicule the indefinite failure construction, as though it were absurd, but the mere fact that for centuries the best legal minds regarded it as the normal and rational construction, shows that there cannot be anything absurd about it; and another reason is as follows: If there be a devise to A and his heirs, and if he die without issue to B and his heirs and if this be in a country in which the estate tail is very common, as it is to-day in England, as much as it ever was, what appears to be the testator's intention is, first, to benefit A, and after him to benefit his issue, and after them to benefit B. Now, this can be accomplished by giving A an estate tail, with vested remainder over to B. Suppose, on the other hand, that the definite failure construction be adopted. This gives a good executory devise to B, which is not void as too remote, for it must take effect, if ever, at the death of A. But suppose A to die leaving issue, B can never take, so that one object of the testator's bounty is defeated. Now, the issue of A, provided he ever had any, may become extinct very soon after A's death, and this fee simple will then descend, — we are speaking the language of the common law, — to the collateral heir of the issue, being a fee simple, which collateral heir is, of course, the collateral heir of A. Now, there is no sign that the testator desired the collateral heir to take this property to the exclusion of B. We may add that in this country where the estate tail is not in harmony with our notions and our institutions, it is very natural that there should be a dislike of the indefinite failure construction; but this law, like the common law in general, grew up in England, and we have it in this country by adoption.

The estate tail has been abolished in many states, but in some of these it has been converted into an estate for life,

with remainder to the issue; in others, it has been converted into a fee simple;<sup>1</sup> but the learning upon this subject is as important in states of either of these classes as it is in those states where the estate tail still exists; because in those states in which there has been this conversion of the estate tail by statute, you first must find from your deed or will whether you have an estate tail, and if you have got one you must convert it under the statute.

The definite failure construction is by no means a modern invention. *Pells v. Brown*<sup>2</sup> is, perhaps, the leading case. In this case there was language found in the will which served to explain the failure of issue clause, and to show that it must reasonably import a definite failure of issue. The devise of real estate was to A and his heirs, and, if he die without issue, living B, then to B and his heirs. It was evident that B could not take unless he were living at the death of A, and this showed that it was the intention that the failure of A's issue should be referred to the same point of time, so that for B to take, no issue must survive A, and, moreover, B must himself survive A. Another very clear case is a devise to A and his heirs, and if he die under twenty-one years of age and without issue, then over. Evidently, the intention is that the estate shall go over only if A die under twenty-one and no issue survive him.<sup>3</sup> Then again, if there be a devise to A and his heirs, and if he die without issue, to B for life, it is

<sup>1</sup> *In re Wells' Estate*, 38 Atl. Rep. 83 (Vt.); *Moore v. Gary*, 48 N. E. Rep. 630 (Ind.); *In re Kelso's Estate*, 37 Atl. Rep. 747 (Vt.); *Kyner v. Boll*, 54 N. E. Rep. 925 (Ill.); *Waters v. Lyon*, 40 N. E. Rep. 664 (Ind.); *Beilstein v. Beilstein*, 45 Atl. Rep. 73 (Penn.); *Palethorp v. Palethorp*, 45 Atl. Rep. 322 (Penn.); *Stouch v. Zeigler*, 46 Atl. Rep. 486 (Penn.); *Patterson v. Madden*, 33 Atl. Rep. 51 (N. J.); Tied. R. P. § 538, note; 1 Dembitz on Land Titles, § 18.

<sup>2</sup> *Pells v. Brown*, Cro. Jac. 590. See further, *Bank v. Depauw*, 75 Fed. Rep. 775; *Strain v. Sweeney*, 45 N. E. Rep. 201; *Gray on Perp.* § 159; 2 Wash. R. P. 362; 4 Kent's Com. 277.

<sup>3</sup> *Tudor's Lead. Cas.* (3d ed.) 646, 687 *et seq.*, 722; 2 Wash. R. P. 362, 375, 377; 1 Wash. R. P. 74; *Allen v. Trustees of Ashley School Fund*, 102 Mass. 263, 264.

so improbable that a mere life estate would be given to B upon the ultimate extinction of A's issue, that the definite failure construction is necessitated.<sup>1</sup> Here the frame of the will plainly requires a definite failure construction.

A very leading case on this subject is *Hall v. Chaffee*.<sup>2</sup> It was a devise to the testator's daughter A, and in the following language: "To A and her heirs, and, provided that if she should die without issue born alive of her body to heir her estate," then over to two other daughters of the testator. The expression "heir her estate" is quaint and is not illiterate, because it is old English and was a survival in New Hampshire as late as the nineteenth century. The will also provided that A should have the use and occupation of the premises which were the subject-matter of the devise during her natural life, and after her decease that the property should go to two other daughters of the testator and their heirs. Upon the whole will the court held this to be a definite failure clause and laid stress in the opinion upon the provision that she was to have the use and occupation of the premises during her life, and the other provision that it was to go over after her decease. Parker, C. J. says, in this case, that the estate tail is contrary to the spirit of the laws of New Hampshire, and he says that the estate tail had never been abolished in New Hampshire, and he remarks, old as

<sup>1</sup> See the authorities in note 3, page 214, above.

<sup>2</sup> *Hall v. Chaffee*, 14 N. H. 215. Now it may be interesting to note that in *Jewell v. Warner*, 35 N. H. 176, and *Dennett v. Dennett*, 40 N. H. 500, the court says that the estate tail was abolished by a statute much older than the devise in the above case. But in the very celebrated late case, about which much has been written, of *Edgerly v. Barker*, 31 Atl. Rep. on page 907 (N. H.), Doe, C. J., says that the estate tail never did exist in New Hampshire. Every one of these statements is *dictum*. And here it may be well to point out how in this country this subject stands. In some states, for example Massachusetts, the estate tail is preserved in its purity; in others it never had any existence, for example, as shown in a previous chapter, South Carolina, which still has the fee simple conditional and not the estate tail; in others, as above shown, it has been converted into something else.

this case is, that the number of cases on this subject "is legion."

When upon the rule in Shelley's Case we saw that such words as "sons" and "children" are sometimes in a will taken to be words of limitation; but such cannot be stated to be the general rule, and, in treating of the failure of issue clause, there are many cases where the devise has been to "sons" or "children" with a failure of issue clause, and in some the clause has been held to be indefinite, and in some to be definite. Probably the cases cannot be reconciled, but they turn upon fine points contained in the provisions of the will. Of course, the provision is more likely to be held to import a definite failure of issue than when more technical words than "sons" or "children" are used.<sup>1</sup> We have recently considered two Massachusetts cases, in one of which, *Nightingale v. Burrill*,<sup>2</sup> the devise was to A and her children, but if she should die and leave no children, then over; and in the other, *Wheatland v. Dodge*,<sup>3</sup> in which the devise was to A, his children or grandchildren, which was accompanied with a failure of issue clause, and in both of these cases the construction was that of an indefinite failure of issue.

A remainder limited after an estate tail, with no contingency limited, is a vested remainder. A failure of issue is considered certain to happen at some time or other. But, if the limitation is to take effect on the regular expiration of an estate tail by reason of a failure of issue at a particular time, a failure of issue of the first taker, which time is at the death of the tenant in tail, the remainder is a contingent remainder.<sup>4</sup> In other words, if the limitation be, that in case the

<sup>1</sup> Tudor's Lead. Cas. (3d ed.) 650-654, 723; 2 Shars. & Budd, 496-500; *Nightingale v. Burrill*, 15 Pick. 112; *Stouch v. Zeigler*, 46 Atl. Rep. 488 (Penn.).

<sup>2</sup> *Nightingale v. Burrill*, 15 Pick. 112.

<sup>3</sup> *Wheatland v. Dodge*, 10 Met. 505.

<sup>4</sup> 2 Jarman on Wills (5th ed.), 446; Smith's Essay, §§ 192-194; Fearne on Rems. 7, note; Williams on Seizin, 65, 66; Williams, R. P. 59, 105, 404; *Moore v. Gary*, 48 N. E. Rep. 632.

estate tail shall run out at a given period named and the remainder to take effect in that event only, it is a contingent remainder. An illustration is: to A and the heirs of his body, and if he die without leaving issue of his body living at his decease, to B and his heirs. B will have a contingent remainder. In *Ralston v. Truesdell*<sup>1</sup> there was a devise of real estate to A and the heirs of his body, but if he should die and leave no child or children, then over. This gave A an estate tail, and the limitation over was a contingent remainder upon a definite failure of issue. Here we have a case in which the word "children" is used in a clause which is held to import a definite failure.

Now taking up survivor cases, the failure of issue clause in this class of cases has often been held to import an indefinite failure, and has often been held to import a definite failure. It is safe to say that the cases are irreconcilable. Taking up Massachusetts, there are the cases of *Brightman v. Brightman*<sup>2</sup> and *Hall v. Priest*.<sup>3</sup> In *Brightman v. Brightman* the devise of real estate was to A and B and their heirs, with a failure of issue clause providing that the estate should go to the survivor upon the death of either without issue. In *Hall v. Priest* there was a devise to the testator's nine children, providing that the estate should go over to the survivors upon the death of any without issue. In *Brightman v. Brightman* it was held that the clause imported a definite failure of issue, thus giving determinable fees to A and B with a valid executory devise over to the survivor. In *Hall v. Priest* it was held that the clause imported an indefinite failure of issue, thus giving the nine children estates tail with

<sup>1</sup> *Ralston v. Truesdell*, 35 Atl. Rep. 813 (Penn.). In this case the decision is that the estate was to go over upon a definite failure of issue, and not of children merely; yet the court calls the limitation over an executory devise. Certainly, this limitation over, upon the above construction, was a contingent remainder, as above stated.

<sup>2</sup> *Brightman v. Brightman*, 100 Mass. 238.

<sup>3</sup> *Hall v. Priest*, 6 Gray, 18.

cross remainders in fee. So far as one can discover, in *Brightman v. Brightman* there were separate clauses, the first conferring a gift, and the second, the failure of issue clause, coming in subsequently and calculated to defeat the gift upon a contingency. But in *Hall v. Priest* it would seem that the language of the gift and the failure of issue clause were not separate and distinct, but were all one continuous expression. If this be not the distinction between the two cases, we think they cannot be reconciled, and in *Schmaunz v. Goss*,<sup>1</sup> Field, J., says that it is a material circumstance in Massachusetts whether the clauses are separate or are not separate in determining whether the failure of issue clause shall be taken to import a definite or an indefinite failure of issue. It ought to be pointed out, though, that this was not a survivor case.

*Chadock v. Cowley*<sup>2</sup> was a devise of Blackacre and Whiteacre to A for life, and after her death Blackacre to B and his heirs forever, and Whiteacre to C and his heirs forever; and that the survivor of them shall be heir to the other if either of them die without issue. It was held that B and C took estates tail with cross remainders in tail. Of course, to produce this construction the failure of issue clause was taken to import an indefinite failure of issue. These cross remainders in tail were held to be vested remainders absolute, and not vested remainders defeasible upon a condition subsequent, nor contingent remainders. And so Mr. Fearne says in his work on remainders.<sup>3</sup> The reason that these cross remainders were vested remainders absolute is because there is no contingency which is capable of creating a contingent remainder. Should B and his stock outlast C and his stock, then B and his stock would have the whole of the property in tail, and *vice versa*. But there is no such contingency as to make the

<sup>1</sup> *Schmaunz v. Goss*, 132 Mass. 145.

<sup>2</sup> *Chadock v. Cowley*, Cro. Jac. 695.

<sup>3</sup> Fearne on Rems. 247.



remainder other than vested and absolute. It is no test of a vested remainder absolute that it shall necessarily take effect in possession. Thus, to A for life, remainder to B for life. This is a very simple vested remainder absolute, yet B may die before A, so that he may never get the possession. In the one case, then, we have the uncertainty as to the survival of stocks or families; in the other case, the uncertainty as to the survival of the person, — but the principle is the same in each case.

Suppose, however, that the cross remainders had been in fee instead of in tail, as they were in *Hall v. Priest*,<sup>1</sup> above cited. We think that cross remainders in fee, whether expectant upon estates tail or expectant upon life estates, are contingent remainders. Had the cross remainders in *Chadock v. Cowley* been in fee they would have been expectant upon estates tail, and would have been contingent remainders. In *Hall v. Priest* they were cross remainders in fee expectant upon estates tail. Now, whether the particular estates be for life or in tail, we think that cross remainders in fee are contingent remainders. Another illustration would be, as shown in a previous chapter on cross remainders, to A and B for life, remainder to the survivor in fee. In the case of cross remainders in fee the reversionary right, that is, the fee, is in contingency until the contingent remainder takes effect or vests, and, upon the contingent event occurring, that estate in fee is suddenly transferred to the survivor; it is, as it were, a new estate which is transferred to the successful individual. But in the case of estates tail with cross remainders in tail (*Chadock v. Cowley*), the reversion is never moved; it passes to nobody on any contingency whatever, but remains, until all the estates tail have become extinct, in the heir of the testator, and then it takes effect in possession.

We thus see that a cross remainder in fee is a contingent remainder. The next question is, whether in a case of estates

<sup>1</sup> *Hall v. Priest*, 6 Gray, 18.

for life, or estates tail with cross remainders in fee, the accrued shares will pass; and we do not see how they can pass. For example, take a case like *Hall v. Priest*, above, in which there were nine estates tail with cross remainders in fee. One of these parties, A, dies without leaving issue surviving him; each one of the survivors then has in possession his original one-ninth and an accrued share, which is one-seventy-second. This one-seventy-second part is in fee. If the limitation be that only of cross remainders we do not see how it can pass over, for the limitation over of that accrued share could not be a remainder, as it would be a fee upon a fee.<sup>1</sup>

We now speak of real estate limited in fee and of personal property limited absolutely, in other words, limited as a transmissible interest. By an absolute or transmissible interest of personal property we mean an interest which, upon the death of the party, may pass to his executor or administrator, and, therefore, like as in the case of a fee of real estate, be a larger interest than a mere interest for one's life. If real estate in fee, or personal property limited absolutely, that is, as a transmissible interest, be given to three or more persons specially named, as, A, B, and C, as tenants in common, and with a provision that if any of them die without issue, construed as a definite failure of issue, or die under a given age, or die unmarried, the share of the one so dying to be divided among the survivors, the original shares will go over, but not an accrued share.<sup>2</sup> And this principle of the accrued shares not going over applies also when the beneficiaries

<sup>1</sup> Preston (1 Preston on Estates, 96), in defining cross remainders among three or more persons, makes the accrued shares to pass over, so that finally the entirety of the land centres in one person. But, notwithstanding, he indicates (see p. 101) that cross remainders may be so limited as not necessarily to centre in one person, owing to the accrued shares not passing. Preston gives in his treatise on cross remainders (being in 1 Preston on Estates, 96-115) no illustration of estates tail with cross remainders in fee.

<sup>2</sup> Hawkins on Wills (2d Am. ed.), 268-271; Jarman on Wills (6th ed. by Bigelow), 1520, 1521.

are a class, as children, for instance.<sup>1</sup> But if there be an ultimate limitation over, so that the whole goes over in one mass, then the accrued shares go over with the original shares upon the death. Otherwise, the legal personal representatives, or heirs, of some one who had died, must be divested of an accrued share in favor of the ultimate taker. But in such case it will not pass to the legal personal representatives or heirs, but will pass, together with the original shares, to the survivors.<sup>2</sup> And this principle of the accrued shares going over, provided that there is an ultimate limitation over, applies also when the beneficiaries are a class, as children, for instance.<sup>3</sup> The ultimate limitation over, so that the whole goes over in one mass, may be limited to such one as shall be the surviving member of the class.<sup>4</sup> But the accrued shares may be made to go over, by virtue of language calculated to produce that result, without any explicit ultimate limitation over.<sup>5</sup>

<sup>1</sup> Jarman on Wills (6th ed. by Bigelow), 1522; but Hawkins says (Hawkins on Wills (2d Am. ed.), 269, and see further p. 69 and note 3), that in the case first above put in the text, even without an ultimate limitation over, "no doubt," the whole would pass to the survivors if any should die before the testator. And so, where there were limitations to a class for their lives, and over absolutely to their children, and, in case of a member of the class dying without children, his share to be added to the other shares, it was held that an accrued share did not pass. *Corse v. Chapman*, 47 N. E. Rep. 812 (N. Y.).

<sup>2</sup> Hawkins on Wills (2d Am. ed.), 269-271; Jarman on Wills (6th ed. by Bigelow), 1523 *et seq.*; *King v. Frost*, 15 App. Cas. 584.

<sup>3</sup> Jarman on Wills (6th ed. by Bigelow), 1524; *Lombard v. Witbeck*, 51 N. E. Rep. 61 (Ill.).

<sup>4</sup> Jarman on Wills (6th ed. by Bigelow), 1524, 1525.

<sup>5</sup> Jarman on Wills (6th ed. by Bigelow), 1525. It is to be observed that the matter here considered is not merely when there is an ultimate limitation over, but also when the will contemplates that the share of the one so dying — as above — is itself to go over to survivors. Where there was no such contemplation, and yet where the shares were vested, and were in fee, or were absolute, that is, transmissible interests in personalty, and there was an ultimate limitation over, and yet there was no shifting of the shares among the members of the class, but the share of one dying devolved upon his legal personal representatives or heirs until the whole went over, see Jarman on Wills (6th ed. by Bigelow), 1358 *et seq.*

If real estate be limited to several persons as tenants in common in tail, if it appear to be the testator's intention that no part is to go over until the failure of the issue of all the tenants in common, they take cross remainders in tail; and thus, cross remaindermen in tail, if there be more than two parts, take the accrued shares. In some of these cases given by Jarman, the only limitation over is to the testator's heirs,<sup>1</sup> or, as in *Doe v. Birkhead*,<sup>2</sup> to the grantor and his heirs. And so, if there be life estates given a class of persons and there be an ultimate limitation over upon a definite failure of issue clause, this serves to create cross remainders among the class for life, so that the accrued shares would pass over.<sup>3</sup>

We come now to the construction of the failure of issue clause, as to whether it shall be taken to import a definite or an indefinite failure of issue, in limitations by will of personal property. It is undoubtedly true that there is a greater disposition to treat the failure of issue clause as definite in bequests than in devises of real estate. But it is the rule that if there would be an estate tail, if the subject-matter were real estate, then the limitation of the personalty will be that of an absolute interest, and the limitation over will be void. The authorities to this point are very many. Illustrative cases are *Hall v. Priest*<sup>4</sup> and *In re Lowman*, *Deverish v. Pester*.<sup>5</sup> A great qualification of this rule is, that if personalty be bequeathed and no real estate with it, the courts are more likely to find something in the will to prevent the estate tail con-

<sup>1</sup> Jarman on Wills (6th ed. by Bigelow), 1339-1349, 1358, 1517, 1518. See further, *Skey v. Barnes*, 3 Mer. 343, cited in 5 Gray's Cases on Prop. 223.

<sup>2</sup> *Doe v. Birkhead*, 4 Exch. 110, 113, 123.

<sup>3</sup> *Ashley v. Ashley*, 6 Sim. 358.

<sup>4</sup> *Hall v. Priest*, 6 Gray, 18.

<sup>5</sup> *In re Lowman*, *Deverish v. Pester* (1895), 2 Ch. 348. See further, Tudor's Lead. Cas. (3d ed.) 687, 748, 861 *et seq.*; 2 Jarman on Wills, 562; Lewis on Perp. 318; Co. Lit. 20 a, note; Fearne on Rems. 461-465; *Tingley v. Harris*, 40 Atl. Rep. 346 (R. I.); *Gallagher v. R. I. Co.*, 46 Atl. Rep. 454 (R. I.).

struction, something, that is to say, which shall import a definite failure of issue construction, than they are when realty and personalty are both limited in the will.<sup>1</sup>

Two reasons are given why if you would get an estate tail, were the subject-matter real estate, you will get an absolute interest in the personalty, and the limitation over will be void : First, you will get in the personalty as near an approach to what in real estate is an estate of inheritance (and an estate tail is, of course, an estate of inheritance) as you can, and that is an absolute interest in the personalty. The second reason why the party takes an absolute interest in the personalty, with the limitation over void, is because of the rule against perpetuities, which would make the limitation over too remote upon an indefinite failure of issue. There is no such thing as a remainder of personal property, so that the limitation over cannot be protected as a remainder expectant upon an estate tail, as there is no remainder and no estate tail in personalty. De Donis does not cover personal property.<sup>2</sup>

The estate tail may be found by the use of the rule in Shelley's Case. Thus, suppose the will of personal property to read, to A for life and after his death to the heirs of his body ; or suppose it to read, to A for life, and if he die without issue, then over ; and suppose in this latter case the failure of issue clause to import an indefinite failure of issue. In each of these cases A would take an estate tail under the rule in Shelley's Case, if the subject-matter were real estate, and A will have an absolute interest in the personalty. This does not mean that the rule in Shelley's Case applies to personal property, for certainly it does not.<sup>3</sup>

In Maryland and Pennsylvania this doctrine concerning the estate tail is extended so that the party will have an absolute interest in the personalty if he would take a fee under the

<sup>1</sup> Tudor's Lead Cas. (3d ed.) 650, 654, 687, 693, 863, 864, 867.

<sup>2</sup> See the authorities in note 5, page 222, above.

<sup>3</sup> Tudor's Lead Cas. (3d ed.) 862 ; Fearn on Rems. 463 *et seq.*

rule in Shelley's Case were the subject-matter real estate. Thus, to A for life, remainder to his heirs, A takes a fee simple in real estate, so that if the subject-matter be personalty instead of real estate, he takes an absolute interest.<sup>1</sup>

It is a principle as old as Coke on Littleton, and has since been applied in various cases, that if there be a bequest of personalty to A for life and after his death to his executors, administrators, and assigns, or to A for life and after his death to his personal representatives, A will take an absolute interest by a sort of analogy to the rule in Shelley's Case.<sup>2</sup> The words "executors," etc., are as strong words in personalty as the word "heirs" is in real estate.

In *Forth v. Chapman*<sup>3</sup> it was held, and has been repeatedly held since, that if in a will real estate and personalty be limited in the same clause, and the word "leaving" be there found as a part of the failure of issue clause, this word will have no influence in making the construction to be that of a definite failure of issue in the case of the real estate, but that it will make the clause to be a definite failure of issue clause in the case of the personalty, so that the real estate may be upon an indefinite failure of issue and the personalty upon a definite failure of issue; and so in any case of personalty where the provision is, "die without leaving issue."

We have thus far discussed the failure of issue clause from the standpoints of the definite and indefinite constructions. We said above that there is a third way of looking at this

<sup>1</sup> *Horne v. Lyeth*, 4 H. & J. 438; *Warner v. Sprigg*, 62 Md. 14, 21, both cited in *Pingrey R. P.* §§ 1017, 1033; *Little's Appeal*, 117 Penn. St. 14, cited in 1 *Dembitz on Land Titles*, p. 152; *In re Eshbach's Estate*, 46 Atl. Rep. 906 (Penn.).

<sup>2</sup> Co. Lit. 54 b; 2 *Jarman on Wills* (6th ed. by Bigelow), 961, 1179; *Williams on Pers. Prop.* 243, 244 (Am. note); *Glover v. Condell*, 45 N. E. Rep. 180 (Ill.).

<sup>3</sup> *Forth v. Chapman*, 1 Peere Williams, 663. See further, *Tudor's Lead. Cas.* (3d ed.) 652, 686, 687, 690, 863, 865; *Hall v. Chaffee*, 14 N. H. 231; 2 *Shars. & Budd*, 494, 495, 496; *Jackson v. Jackson*, 153 Mass. 376; *In re Bence* (1891), 3 Ch. 249; *Peirsol v. Roop*, 40 Atl. Rep. 127 (N. J.); *Patterson v. Madden*, 33 Atl. Rep. 51 (N. J. Ch.).

subject, and we will now take that matter up. In regarding this other way of construing the failure of issue clause we disregard entirely the indefinite failure construction. Suppose, then, there be a devise of real estate in fee, or a bequest of a transmissible interest in personal property, to two or more persons with a provision that if either shall die leaving issue the issue are to take that one's share, but that if either shall die without issue that share is to go over to the other or others. Now it is plain, if we are to take the clause to import a definite failure of issue, that the estate thus given is not a fee, illustrating by real estate. For in no event can the devisee enjoy a fee, since in one alternative the estate would go upon his death to his issue, and in the other alternative to the other devisee or devisees. The result is, in the case of these alternative limitations, that the failure of issue is referred to the time of the testator's death. If a devisee survives the testator he takes a fee simple absolute; and so if a legatee survives the testator he takes an indefeasible interest in the personalty.<sup>1</sup> If, on the other hand, the gifts be, and be construed as, life interests, together with these alternative clauses, the construction will be that of a definite failure of issue, which has been above explained. There is no necessity for referring the failure of issue to the time of the testator's death, and it is to be referred to the time of the death of the tenant for life.<sup>2</sup> In some states the failure of issue clause, even when

<sup>1</sup> 22 Am. Law Rev. 107; *Lawlor v. Holohan*, 38 Atl. Rep. 903 (Conn.); *Arnold v. Alden*, 50 N. E. Rep. 704 (Ill.); *Hawkins on Wills* (2d Am. ed.), 258, 259.

<sup>2</sup> *Olivant v. Wright*, 20 Eq. 220, 223; *Hawkins on Wills* (2d Am. ed.), 177, 258, note 1, 259; *Bowers v. Bowers*, 5 Ch. App. 244; *Campbell v. Noble*, 19 South. Rep. 28 (Ala.); *Heard v. Read*, 169 Mass. 221; *Noland v. Welch*, 40 Atl. Rep. 875 (Md.); *Hollister v. Butterworth*, 40 Atl. Rep. 1044 (Conn.); *Field v. Peeples*, 54 N. E. Rep. 305 (Ill.); *Tudor's Lead. Cas.* (3d ed.) 655, 693; *Rancel v. Creswell*, 30 Penn. St. 158; *In re Baer, Nathan v. Hendricks*, 41 N. E. Rep. 702 (N. Y.); *Jamison v. McWhorter*, 31 Atl. Rep. 517 (Del.); *Healey v. Eastlake*, 39 N. E. Rep. 260 (Ill.); *Preston v. Clabaugh*, 45 Atl. Rep. 887 (Md.).

Where there were limitations for life, under a trust, with remainder to

there were no alternative clauses, has been referred to the time of the testator's death.<sup>1</sup> We regard such a construction as indefensible. We see the necessity for it in the case of alternative limitations when the fee is devised or when a transmissible interest in personalty is bequeathed; but we can perceive no justification for such a construction in an ordinary case in which there are no alternative clauses.

A provision in a will, "if A dies," then over, or a provision in a will, "in case of A's death," then over, assuming that the gift is to A in fee of real estate or of a transmissible interest in personalty, means that the gift is to go over provided that A dies before the testator. On the other hand, if a life interest merely be limited to A, such a provision means

each one's children, and if either life tenant shall die leaving no child or more remote descendant then living, such share to the others, it was held that a share of one dying without any descendant passed to the executor of and trustee under the will of one previously dead, although leaving children, and not to those children. *Cummings v. Stearns*, 161 Mass. 506.

<sup>1</sup> *Moore v. Gary*, 48 N. E. Rep. 632 (Ind.); *Flick v. Forest Co.*, 41 Atl. Rep. 535 (Penn.); *Morgan v. Robbins*, 53 N. E. Rep. 283 (Ind.); *Fowler v. Duhme*, 42 N. E. Rep. 623 (Ind.); *Mitchell v. Pittsburgh Co.*, 31 Atl. Rep. 67 (Penn.); *Benson v. Corbin*, 40 N. E. Rep. 11 (N. Y.); *Washbon v. Cope*, 39 N. E. Rep. 388 (N. Y.).

The above unsatisfactory construction has been somewhat modified in New York in *In re Cramer*, 63 N. E. Rep. 279 (N. Y.).

It is perfectly settled in England that a bequest to A, and if he die without issue, or a bequest to A, and if he die without children, then over, is upon a definite failure of issue, and that it is not to be limited to death before the testator. It is further held that such a bequest is an absolute gift to A, and not that of a mere life estate. *O'Mahoney v. Burdett*, 7 H. of L. 393, 395, 398, 401, 406; *Ingram v. Soutten*, 7 H. of L. 415, 418, 420; *Edwards v. Edwards*, 15 Beav. 361, 363; *Bowers v. Bowers*, 5 Ch. App. 247; 2 Powell on Devises, 765; *Hawkins on Wills* (2d Am. ed.), 256-258 and note 1, 268, 269; *In re Parry and Daggs*, 31 Ch. Div. 133. See also *Bank v. De Pauw*, 75 Fed. Rep. 778.

The above rule may be varied under special provisions contained in the will. *Lewin v. Killey*, 13 App. Cas. 784-787.

And the same principle is applied in England as to making the failure of issue clause definite when the subject-matter is real estate. *Hawkins on Wills* (2d Am. ed.), 205, 215.

In Illinois the clause "if A dies without issue" means dies without ever having had issue. *Field v. Peeples*, 54 N. E. Rep. 305 (Ill.).



that the gift is to go over upon the death of A. And so if a life interest be limited to X and then over to A, accompanied by such a clause as the above, by this is meant that the gift is to go over in case of the death of A during the lifetime of X. In the first of these limitations it is necessary to refer the death of A to a time preceding the death of the testator, because it is certain that A must die, and the gift over is by way of substitution for the gift made to A, and there is no other time to which the clause can be referred than the time of the testator's death. But when the gifts are successive and not by way of substitution, then there is no objection to referring the period of A's death to a time later than the death of the testator. And so if the gift be to A if and when he attains twenty-one years of age, "and in case of his death" to B, A takes absolutely unless he dies under the given age. It is perceived that in all of these cases the time of the death of A is with reference to the period of distribution. In the one case the death of the testator is the period of distribution. In case of the life interest given A the period of distribution is at his (A's) death; and in the case of the limitation to X the period of distribution is the time of the death of X. And so in the case of the gift to A if and when he attains twenty-one years of age, the attaining twenty-one years of age is the period of distribution.<sup>1</sup>

A bequest of personal property to "A or his issue" is the equivalent of a gift to A, and, in case of his death, to his issue. And so, in a bequest of personalty, a limitation to A or his heirs is the equivalent of a limitation to A, and in case of his death to those persons who would take under the statute

<sup>1</sup> *Crossman v. Field*, 119 Mass. 172; 22 Am. Law Rev. 107; *Goodwin v. McDonald*, 153 Mass. 481; *Hawkins on Wills* (2d Am. ed.), 243-245, 249, 254-257; *Briggs v. Shaw*, 9 Allen, 517; *Williams v. Allison*, 33 Iowa, 283; *Bank v. De Pauw*, 75 Fed. Rep. 778; *In re Valdez's Trusts*, 40 Ch. Div. 159; *Seaver v. Griffing*, 57 N. E. Rep. 220 (Mass.); *Pollock v. Farnham*, 156 Mass. 389; *Bentz v. Maryland Soc.*, 37 Atl. Rep. 708, 709 (Md.); *Penny v. Commissioners* (1900), App. Cas. 628.

of distributions in case of the death of A before the period of distribution. But in real estate such words usually give the fee.<sup>1</sup>

<sup>1</sup> Hawkins on Wills (2d Am. ed.), 91, 180, 247, 255; *Price v. Forrest*, 35 Atl. Rep. 1075 (N. J.); Chaplin on Wills, 453; *White v. Stanfield*, 146 Mass. 424; *Kendall v. Gleason*, 152 Mass. 457; *Lawrence v. Crane*, 158 Mass. 392.

It is suggested in *O'Rourke v. Beard*, 151 Mass. 10, that even in real estate the same construction may be given as in personalty, and in this case it is stated that in England the personalty construction has been given in the case of realty and personalty together.

As to its being sometimes not the statute of distributions but the statute of descent when there is a limitation of personalty, see cases cited in *Sweet v. Dutton*, 109 Mass., on page 591; *Fabens v. Fabens*, 141 Mass. 399-401; *Proctor v. Clark*, 154 Mass. 45; *Olney v. Lovering*, 167 Mass. 446.

## CHAPTER XIX.

THE REMAINDER WITH A DOUBLE ASPECT, AND  
THE SPLIT LIMITATION.

THREE things are to be remarked about the remainder with a double aspect. First, the first remainder must be a contingent remainder; secondly, it must be in fee; thirdly, the 'remainder over is a contingent remainder. The case usually selected by text-writers to elucidate this subject is *Luddington v. Kime*.<sup>1</sup> It was a devise of real estate to A for life, and in case he should have any issue male then to such issue male and his heirs, and if he should die without issue male then to B and his heirs. A had died at the time the case arose without ever having had issue male, and it was held that on that account the estate should go to B in fee. This is a curious construction, but that is what the court says. So it seems that B could never have had it, if A had ever had issue male. The result is we have a remainder with a double aspect. The first remainder is, of course, contingent. The limitation to B is evidently an alternative contingent remainder. It cannot be a conditional limitation, that is, an executory devise, because it cannot possibly cut short the estate of the issue male. The estate of B is therefore a remainder, and the two remainders give us a case of the remainder with a double aspect.

The construction in *Luddington v. Kime*, as above shown, is peculiar; but the value of the case is not a particle affected thereby as an excellent example of the remainder with a double aspect. Nor is its value for this purpose

<sup>1</sup> *Luddington v. Kime*, 1 Lord Raymond, 203.

affected by the fact that it ought to have been held to give A an estate tail under the rule in Shelley's Case; and later decisions in England have held in similar cases that A takes an estate tail under the rule in Shelley's Case.<sup>1</sup> There are certain American cases which have followed this case, giving the issue male a fee on account of these superadded words of limitation, namely, "his heirs."<sup>2</sup> We regard these cases as unsound. But if to the word "issue" there be added words both of limitation and of distribution, there are decisions which we think lead to the conclusion that the issue will take as purchasers, therefore that the rule in Shelley's Case will not be applied.<sup>3</sup> Words of distribution are words indicating an intention that the parties shall take as tenants in common. Such phrases as the following express words of distribution, "share and share alike," "to take as tenants in common," "to be equally divided between them." Now, in *Grimes v. Shirk*<sup>4</sup> the court of Pennsylvania has held that the rule in Shelley's Case shall be applied notwithstanding that both words of limitation and of distribution are added to the word "issue," and they therefore held that A would take an estate tail. We have already shown that in some states where the estate tail has been abolished by statute it has been converted by statute into an estate for life in the ancestor with remainder to his issue, while in others it has been converted into a fee simple. A statute of this latter class obtains in Pennsylvania, and consequently in *Grimes v. Shirk* the estate tail was converted into a fee simple in the ancestor.

As already mentioned, for a remainder with a double aspect

<sup>1</sup> Tudor's Lead. Cas. (3d ed.), 617-619; Hawkins on Wills (2d Am. ed.), 195, 196.

<sup>2</sup> 2 Jarman on Wills (Randolph & Talcott's ed.), 417, 419 and note 5, 420-424.

<sup>3</sup> Tudor's Lead. Cas. (3d ed.) 619; Hawkins on Wills (2d Am. ed.), 192.

<sup>4</sup> *Grimes v. Shirk*, 32 Atl. Rep. 113 (Penn.).

both remainders must be contingent remainders, and the first one must be in fee. Mr. Hayes, in his "Principles,"<sup>1</sup> a book of great authority, says, that if the second remainder be to an ascertained person, it ought to be held vested, but defeasible; but he admits that the law is the other way. There is a very large number of cases in which a limitation over to an ascertained person has been spoken of by the court as vested but defeasible, simply because it is to an ascertained person, and may descend to his heirs in case of his death. The error of this is evident, and no better proof of it is required than Mr. Fearn's illustration of his first class of contingent remainders, namely, to A till B returns from Rome, and after his return to C in fee. The estate of C is a contingent remainder, notwithstanding it will descend to the heirs of C. There is a dictum in *Trumbull v. Trumbull*,<sup>2</sup> which is a case of the remainder with a double aspect, that the second remainder is vested but defeasible. It is only a dictum, and the correct doctrine on this point appears in *Taft v. Decker*,<sup>3</sup> in which there were two alternative remainders, both in fee, and they were both held to be contingent remainders, although the second remainder was to an ascertained person in fee. An illustration of the above mentioned class of cases is *Dana v. Sanborn*.<sup>4</sup> Professor Gray, in his "Perpetuities,"<sup>5</sup> attacks this erroneous way of looking at the subject. Another argument against it we shall present when we have got deeply enough into property law to make the second argument intelligible.

*Egerton v. Massey*<sup>6</sup> is another good example of the

<sup>1</sup> Hayes' Principles, 81-87.

<sup>2</sup> *Trumbull v. Trumbull*, 149 Mass., on p. 204.

<sup>3</sup> *Taft v. Decker*, 182 Mass. 106.

<sup>4</sup> *Dana v. Sanborn*, 46 Atl. Rep. 1053 (N. H.).

<sup>5</sup> Gray on Perp. § 118.

<sup>6</sup> *Egerton v. Massey*, 3 C. B. (N. S.) 338, stated in Gray on Perp. § 113 a. See also *Larmour v. Rich*, 71 Md. 369; *Numsen v. Lyon*, 39 Atl. Rep. 533, 534 (Md.); *Nowland v. Welch*, 40 Atl. Rep. 875 (Md.); *Furnish v. Rogers*, 39 N. E. Rep. 989 (Ill.).

remainder with a double aspect. It was a devise of real estate to A for life, and after A's death to the children of A and their issue living at A's death, and in default of such issue over to B and his heirs. By virtue of the expression "living at her death" we have plainly a contingent remainder, and evidently the alternative limitation is a remainder. It can by no possibility derogate from the estate limited to the children and their issue, which was in fee. It is like *Luddington v. Kime*, in that it is classified with it as a remainder with a double aspect; in other respects it is dissimilar. In *Luddington v. Kime* the theory is, that had issue male been born, he would have taken a vested remainder absolute; but in *Egerton v. Massey* we have what we may call a continuously continuing contingent remainder, because it must remain a contingent remainder during the entire lifetime of A.

As already shown, in order to give a remainder with a double aspect, the first remainder must be both contingent and in fee. Now, suppose it be contingent, but for life or in tail, and that the second remainder be to an ascertained person. This second remainder is then a vested remainder. This is upon abundant authority, and, of course, it is not a case of the remainder with a double aspect.<sup>1</sup> Indeed, in *Luddington v. Kime*, above, it is pointed out by the court<sup>2</sup> that had the remainder to the issue male been in tail, the remainder over would have been a vested remainder. Such a case would amount to this: to A for life, remainder to the issue male in tail, and if A die without issue male, then to B and his heirs. It will be remembered that issue male was never born, and, of course, the remainder was a contingent remainder. Now, had A died, issue male never having been born, the estate of B would be accelerated by the removal of

<sup>1</sup> Hayes' Principles, 29, 30, 81-87; Fearne on Rems. 223-225, 352, 353, 374-377.

<sup>2</sup> *Luddington v. Kime*, 1 Lord Raymond, on pp. 208, 209.

the particular estate in tail. Now, suppose that the first remainder be for life or in tail, and be a vested remainder. Above we have assumed it to be a contingent remainder, but if it be a vested remainder, then the remainder over is contingent. This comes under Fearne's second class of contingent remainders. His form is, to A for life, remainder to B, an ascertained person, for life, and if B die before A, remainder to C for life. C has a contingent remainder.<sup>1</sup>

The limitation over may sometimes take effect without derogating from the preceding estate, but if it possibly may take effect by derogating, then it is a conditional limitation and, if in a will, an executory devise, and not a contingent remainder, and the case is not that of the remainder with a double aspect. This well-settled principle of law is admirably illustrated by the very able decision in *Godwin v. Banks*.<sup>2</sup> It was a devise to the testator's daughters for their lives, and then to their issue living at their deaths, and in case of the death of issue under age and without issue, to go over. Had there been an extinction of issue at the expiration of the particular estates the limitation over would not have derogated, for the remainder to the issue was what we have above called a continuously continuing contingent remainder. But the limitation over was held to be an executory devise, because it might take effect in derogation of the preceding limitation in fee, for it might go over after the estate had come into the possession of the issue, by the death of the issue under age and without issue.

In *Gulliver v. Wickett*<sup>3</sup> there was a devise to the testator's widow for life and after her death to her child and its heirs, but if it should die under twenty-one years of age leaving no issue of its body the estate was to go over. The testator supposed his wife to be *enceinte*, and the remainder was limited

<sup>1</sup> Fearne on Rems. 5 *et seq.*

<sup>2</sup> *Godwin v. Banks*, 40 Atl. Rep. 268 (Md.).

<sup>3</sup> *Gulliver v. Wickett*, 1 Wilson, 105.

to this supposed child. It turned out that she was not pregnant, and at her death the question arose whether the limitation over should take effect. It was held that it should take effect, and yet there was no provision in the will in terms for its taking effect upon the event which actually occurred, of there being no child at all. The court seems to have been of the opinion that the limitation over took effect as an executory devise, and Mr. Fearne is of the opinion that that was the idea of the court. Lord Cranworth in *Evers v. Challis*,<sup>1</sup> a case presently to be discussed, thinks that the limitation over in *Gulliver v. Wickett* took effect as a contingent remainder, and disagrees with Mr. Fearne on this point. In our own opinion the limitation over was conceived of by the court as taking effect as an executory devise, because it was so limited as possibly to derogate from the previous estate given to the child. A close analysis will show that it ought to have been considered as taking effect as a contingent remainder upon the theory of what is known as an implied split limitation, which we will now proceed to explain; but in our own opinion this fine distinction had not occurred to the minds of lawyers and judges so far back as the time of *Gulliver v. Wickett*.

*Evers v. Challis*<sup>2</sup> was a devise to sons and daughters, but the limitations to the daughters may be omitted as not required for discussion here. It was substantially as follows: A devise of real estate to A for life, and after her death to her sons who should live to attain the age of twenty-three years, and if no son should live to attain the age of twenty-three years, then over to B and his heirs. Now the period allowed by the rule against perpetuities is lives in being at the testator's death and twenty-one years and nine months added. It is evident that the limitation over might take effect in this case at a time more remote than the above period, for a son might be

<sup>1</sup> Lord Cranworth in *Evers v. Challis*, 7 H. of L. Cas. 549.

<sup>2</sup> *Evers v. Challis*, 7 H. of L. Cas. 531.



born who would die more than twenty-one years after the death of A, who is understood to be a life in being at the testator's death. Indeed, such a son might live nearly two years over the twenty-one years and then die. This limitation over was evidently void as too remote. The theory is that such a son would have taken a vested remainder at birth or conception, which would have been capable of being cut short by the conditional limitation, were not the conditional limitation void as too remote. So, of course, the vested remainder, had there been one, would not be cut short, but would be a vested remainder absolute. Now in point of fact, A died without ever having had a son, and the question, of course, arose whether the limitation over might not be sustained upon that contingency. But to sustain it on that contingency the court must read into the will a provision not in terms found there. In other words, the Court must split the limitation and imply one of the parts. Thus, to read it into the will, the court must read between the lines and discover what was really implied by the language of the will although not expressed. This the House of Lords did, and sustained the limitation over. The two parts would then be as follows: First, the implied part, which would be to A for life, remainder to her sons, and if she never has any son, then to B and his heirs. This is a remainder with a double aspect; two alternative contingent remainders, the first in fee, and so indeed is the other in fee. The other part, the one actually expressed in the will, to A for life, remainder to her sons who shall attain the age of twenty-three years, and if no son shall attain that age, then over. This is a case of a contingent remainder with a limitation over, which limitation over is a void executory devise. The courts will not raise an implied split limitation except when they can have a remainder. Therefore, when the subject-matter is personalty, or if there be an equitable limitation of real estate, the courts will not imply a term of the sort, and of course the limitation over will be void as

too remote.<sup>1</sup> It is unfortunate in these cases that the age specified should exceed twenty-one, for were it twenty-one there would be no difficulty with the rule against perpetuities.

<sup>1</sup> Gray on Perp. §§ 339, 341, 342 *et seq.*; Tudor's Lead. Cas. (3d ed.) 490, 601, 870; *In re Bence*, *Smith v. Bence* (1891), 3 Ch. 241; *In re Harvey*, *Peek v. Savony*, 39 Ch. Div. 289; *In re Hancock* (1901), 1 Ch. 482; affirmed on appeal (1902), App. Cas. 14.

## CHAPTER XX.

## THE EXECUTORY DEVISE.

SUPPOSE there be a fee upon special or collateral limitation with a limitation over, surely, if in a will, the limitation over is an executory devise. The question is, is it a conditional limitation; does it, when it takes effect, if ever, cut short the preceding fee; in other words, is it a conditional limitation? Upon this point the authorities are in conflict. On the one side it is said that on the happening of the contingent event the fee first limited abruptly comes to an end, that it is cut short.<sup>1</sup> On the other side it is said that the fee upon special or collateral limitation does, upon the happening of the contingent event, cease, because the bounds of the estate are marked by the limitation, and that it is like any other case of an estate upon limitation which simply expires and is not cut off.<sup>2</sup> In our own opinion the latter view is correct, for it is beyond dispute that if the estate upon limitation be an estate tail or a life estate, it is not cut short by the occurrence of the contingent event and will take effect as a perfectly good remainder,<sup>3</sup> and a remainder cannot abridge the preceding estate; for example, to A during widowhood, and upon her death or marriage to go over; again, to A till B returns from Rome, and after his return to C in fee. In these cases there is no cutting short, and we can see no reason why there should be any difference in this particular whether the estate upon limitation be in fee or for life or in tail. But if it be

<sup>1</sup> *Brattle Square Church v. Grant*, 3 Gray, 149, 150; *Williams*, R. P. 291, 292.

<sup>2</sup> *Smith's Essay*, §§ 117-127 a, 156, 157, 165, 263, 264, 277-280.

<sup>3</sup> *Fearne on Rems.* 5 *et seq.*, 12, note; 4 *Kent's Com.* 199, 200; *Smith's Essay*, §§ 183, 192-194, 263, 264.

in fee the limitation over cannot be a remainder, because no remainder can have a fee for a particular estate. It is therefore an executory devise, if in a will, and may, for convenience, be put under the first class of the executory devise.

The executory devise is of three kinds. The first two relate to real estate, the third to personal property. The first class of the executory devise is the conditional limitation in a devise of land,<sup>1</sup> of which we have already had various illustrations; and under the first class comes also, as above mentioned, the devise over after a fee upon special or collateral limitation. The second class of the executory devise is when a testator creates a freehold estate to begin at a future day, and does not part with the fee.<sup>2</sup> This is Mr. Fearne's method of stating it. Now, the reason why this is an executory devise in a will is because, as pointed out above, a freehold estate cannot at common law be created to begin *in futuro*, and the only way in which it is possible to cause a freehold estate to take effect in possession otherwise than immediately was to limit it as a remainder. The result is that a freehold estate which has no particular estate to support it, and is to take effect at a future day, is not good at common law. It is good in a will, as an executory devise. The fee, so long as the executory devise continues such, remains in the heir of the testator, to whom it descends at the death of the testator. Now, the executory devise of the second class may be upon a contingency, or it may be sure to take effect. The point, therefore, is not that it is necessarily a contingent estate, but that it is a future estate not valid at common law; and although it is not uncommon to find judges who would speak of the executory devise, if to an ascertained person in fee, as vested, yet, properly speaking, no executory devise while it remains such can be vested.<sup>3</sup> It is executory, not vested; and

<sup>1</sup> 2 Wash. R. P. 343, 344, 347, 348.

<sup>2</sup> 2 Wash. R. P. 344.

<sup>3</sup> Gray on Perp. § 114.

thus we have three distinct ideas, — contingent, executory, and vested. Indeed, a contingent remainder may very properly be spoken of an executory, simply because it is not vested.

A contingent remainder cannot be limited upon a term of years. This is a very elementary principle. Smith in his "Essay"<sup>1</sup> gives as a reason that it is a principle of the common law that the freehold cannot be in abeyance; that the freehold must remain in the grantor, and that when the contingent remainder expectant upon the term of years shall take effect, it can only do so by derogating from the freehold estate of the grantor, and that the common law does not allow of derogation; whereas, in the case of a true remainder, the grantor parts with a freehold particular estate which serves as a support to the contingent remainder. The other and more common reason is, that there is no seisin in the tenant for years,<sup>2</sup> which is essential to serve as a support to the contingent remainder; that when a contingent future estate of freehold is limited, there must be a freeholder to serve as tenant to the *præcipe*, against whom actions may be brought. Now, it is perfectly settled that a limitation having the form of a contingent remainder subject to a term of years is not, if in a will, a bad contingent remainder, but is a perfectly good executory devise of the second class. *Goodright v. Cornish*,<sup>3</sup> sometimes cited in contradiction of this last statement, has been thoroughly overruled by *Harris v. Barnes*<sup>4</sup> and *Gore v. Gore*.<sup>5</sup>

*Gore v. Gore*<sup>6</sup> is an old leading case. It was a devise to trustees for the term of five hundred years, and after the

<sup>1</sup> Smith's Essay, § 762.

<sup>2</sup> 2 Wash. R. P. 225, 241, 258.

<sup>3</sup> *Goodright v. Cornish*, 1 Salk. 226; s. c. 4 Modern, 256.

<sup>4</sup> *Harris v. Barnes*, 4 Burr. 2157, and see page 2160.

<sup>5</sup> *Gore v. Gore*, 2 P. Wms. 28, and see pages 55–57. See also, Smith's Essay, §§ 117 *et seq.*; 1 Saunders on Uses (5th ed.), 147; Sugden's Gilbert on Uses, 78, note, being page 168 of the 3d ed. by Sugden; Gray on Perp. § 60; 1 Law Quart. Rev. 418.

<sup>6</sup> *Gore v. Gore*, 2 P. Wms. 27.

determination of the term to the son of the testator's eldest son Thomas in tail male, with many remainders over in tail, and after them to the testator's next son Edward for life, with many remainders over. Thomas, at the testator's death, had never married, but afterwards married and had a son. It was held that the remainder to the son of Thomas in tail male was not void as too remote, notwithstanding the limitation above, namely, the expression "after the determination of the term," because this son of Thomas must take a vested interest, if ever, not later than the death of his father, and his father was a life in being at the testator's death.

To bring out the nature of the estate in *Gore v. Gore*, we may slightly change it, so that it will read: Devise of land to A for five hundred years, remainder to the unborn son of B in tail male, remainder to C and his heirs. Of course, the estate of the unborn son is an executory devise of the second class, because it has the form of a contingent remainder subject to a term of years. The estate of C is not vested, it is executory. The mere fact that it is to an ascertained person, and will descend to his heirs in case of his death, has no tendency to make it a vested estate. This we have heretofore sufficiently shown. The estate of C is an executory devise of the second class, and it is a false understanding that what is executory can be vested. It is a principle of law that all limitations subsequent to an executory devise are themselves executory devises,<sup>1</sup> and so the estate of C is an executory devise. Suppose it were not an executory devise, it would then be a so-called vested remainder, expectant upon the term of years. In an early chapter we gave the case of feoffment to A for years, remainder to B and his heirs, and said that B had a so-called vested remainder, that it was not a true vested remainder, that B had the actual seisin. Now, if C had the actual seisin, then upon a son being born to B, that seisin would have to move backward, and such a proceeding is

<sup>1</sup> *Fearne on Rems.* 503 and note, 504.

unknown to the law; for, upon the son being born or conceived, he immediately has the actual seisin of the estate, and his estate has become changed from an executory devise into a so-called vested remainder in tail male, and at the same moment the estate of C has become changed into a vested remainder expectant upon the estate tail male as its particular freehold estate. Suppose, on the other hand, that B die without having a son, thereupon the estate of C is changed from an executory devise into a so-called vested remainder subject to the term of years.

It thus appears that executory devises may be changed into remainders; but a remainder can never be changed into an executory devise except in the case of a lapse. Suppose a devise to A for life, remainder to the sons of B. Assume B to be a bachelor. A survives the testator and dies, and no son has been born to B. Inasmuch as this can take effect as a contingent remainder, it cannot be preserved as an executory devise, although B afterwards has a son. But there is a case in which a contingent remainder can be changed into an executory devise, and that would be if A were to die before the testator, so that his interest would lapse. Now, what is in form in the will a contingent remainder, becomes on the death of the testator an executory devise of the second class in the sons of B, and if B ever after has a son that executory devise will take effect.<sup>1</sup>

The courts always prefer to construe an interest as a remainder rather than as an executory devise: first, because the remainder is the old common-law estate, and the executory devise is inconsistent with, is not in harmony with, feudalism; secondly, because the executory devise is indestructible by any act of the tenant of the preceding estate, whereas the contingent remainder, except as protected by statute, is very easily destroyed by the tenant of the particular estate. It was the policy of the law under this head to prefer the con-

<sup>1</sup> 2 Wash. R. P. 350; 2 Preston's Abstr. 154.

tingent remainder, because the executory devise through its indestructibility tended to lock up the land from alienation.<sup>1</sup> We have already seen two illustrations of the policy of the law to prevent the locking up the land from alienation. One of these is to-day the practical justification of the rule in *Shelley's Case*, as we have already pointed out in a previous chapter. By the rule in *Shelley's Case* the land can be got into the market one generation earlier. The other illustration of this policy of the law is the rule against perpetuities. But a contingent remainder could be got rid of very easily. The exception to the principle that an executory devise is indestructible, is when it is subject to an estate tail, for the great principle of *Taltarum's Case* extends to all limitations over subject to an estate tail. The common recovery suffered by the tenant in tail will cut off the executory devise.<sup>2</sup>

We have above said that contingent remainders are very fragile things, very easily destroyed; but there is a great deal of legislation both in England and in the United States which protects contingent remainders from destruction. Perhaps we cannot do better than to select the Massachusetts statute as a means of showing the protection afforded by statute and the perils to which the contingent remainder is exposed in the absence of legislation. The Massachusetts statute<sup>3</sup> provides in substance that no expectant estate shall be defeated by alienation, forfeiture, disseisin, surrender, or merger. Let us take these points up one by one. We saw

<sup>1</sup> 2 Wash. R. P. 251, 347, 348; 4 Kent's Com. 264.

<sup>2</sup> 4 Kent's Com. 13, 14.

<sup>3</sup> Massachusetts Revised Laws, ch. 134, §§ 8, 9. It is a pretty fair question whether this Massachusetts statute does not protect an executory devise expectant upon an estate tail from destruction, because the statute excepts from its protection remainders and the reversion expectant upon an estate tail, but does not say anything about the executory devise expectant upon an estate tail; and the Massachusetts statutes provide that remainders and reversions expectant upon an estate tail may be barred by a tenant in tail by a deed in common form. Massachusetts Revised Laws, ch. 127, § 24.



in an early chapter that if a tenant for life creates a fee by feoffment, fine, or recovery, this operates as a disseisin of the reversioner or vested remainderman, who can enter and defeat the granted estate; but such a conveyance would destroy a contingent remainder, because the particular estate required to support it had gone out of existence.<sup>1</sup> So much for alienation, above mentioned. The above conveyances are all of them common-law conveyances, and a statute of uses conveyance by the tenant for life would not defeat a contingent remainder, because it is called an innocent conveyance, and operates merely as an assignment of the life estate.<sup>2</sup>

As to the word "forfeiture," above, that has two applications: first, it means the same thing as alienation above explained; secondly, it will cover the case of waste by a tenant for life, because if a tenant for life should forfeit his estate by committing waste, the contingent remainder expectant upon his estate would be lost,<sup>3</sup> and the statute protects the contingent remainder in this respect.

As to surrender, if the tenant for life should surrender his estate to the reversioner or ulterior vested remainderman, any intervening contingent remainder would be destroyed. Thus, if there be a tenant for life, and expectant upon his estate there be a contingent remainder limited, followed by a vested remainder in fee or by the reversion in fee, and if the tenant for life surrender his estate to the vested remainderman or to the reversioner, this has the effect of destroying the intermediate contingent remainder. And the principle of merger is illustrated by the same example; for the two estates, that for life and that in fee, being united in one person, will, in both of these cases, merge, the lesser being swallowed up in the greater, so that the intermediate contingent remainder is destroyed.<sup>4</sup>

<sup>1</sup> 4 Kent's Com. 253, 254.

<sup>2</sup> 2 Black. Com. (Shars. ed.) 171, note.

<sup>3</sup> *Blanchard v. Blanchard*, 1 Allen, 230.

<sup>4</sup> Williams, R. P. 281, 282.

The last item to be considered in the elements above mentioned as contained in the Massachusetts statute is that of disseisin. The question is, how could an expectant estate be defeated by disseisin? This brings us to some old law containing the distinction between rights of entry and rights of action upon disseisin. So long as a right of entry existed anterior to the contingent remainder, the contingent remainder would not be defeated;<sup>1</sup> but a right of action was not enough to support a contingent remainder.<sup>2</sup> Suppose that there be a disseisin, of course there is a right of entry in the disseisee; but under the old law this right of entry could be lost by what is called descent cast, and the right of entry would be converted into a right of action. If, then, the disseisor should die, whereby the descent would be cast upon his heir, this was said to toll the entry, and the disseisee would have only a right of action. This was obviated by continual claim, which was the making an entry claiming the land, and it must have been made within a year and a day before the death of the disseisor.<sup>3</sup> Several reasons are given by Coke in his treatise on Littleton<sup>4</sup> for the conversion of the right of entry into a right of action by descent cast, and the best of them is that if continual claim were not made the heir of the disseisor might not know of the outstanding claim to the land, and that he ought to have the right to fight it out in court rather than to be entered upon. The statute 32 Henry VIII. ch. 33, provided that the entry should not be tolled by descent cast, unless the disseisor had been in peaceable possession of the land without entry or continual claim for five years before his death.<sup>5</sup> Now, suppose the disseisee to be a tenant for life, and that expectant upon his life estate

<sup>1</sup> Fearne on Rems. 286 and note, 287.

<sup>2</sup> Fearne on Rems. 287, 288; Litt. § 595; Shep. Touch. 210, note (h).

<sup>3</sup> Fearne on Rems. 286, 287; 1 Gray's Cas. on Prop. 452; Gilbert on Tenures, 37, 42.

<sup>4</sup> Co. Litt. 237 b.

<sup>5</sup> Co. Litt. 238 a; Gilbert on Tenures, 37, note by Watkins, 23, note.

there be a contingent remainder. The disseisin does not defeat the contingent remainder, because there is a right of entry, but if this right of entry be converted into a right of action the contingent remainder is destroyed.

The books are filled with cases in which testators, after a series of gifts in the will, wind up with an ultimate limitation to the testator's heirs at law. Generally speaking, these limitations to the heirs of the testator are void, and this is but saying that the law prefers that the heirs shall take by descent and not by purchase.<sup>1</sup> Under the old law it was immaterial for the purpose of ascertainment whether they took under the will or outside of the will, because they were ascertained in each case as of the time when they should take the estate in possession, if ever.<sup>2</sup> But under modern law, if they take by descent they are ascertained as of the time of the testator's death. If, however, they take under the will, they are ascertained as of the time when they shall take the estate in possession, if ever.<sup>3</sup> It makes a great difference as to what people shall be entitled, whether they are ascertained as of the one time or the other. If they take by descent, it is evident that the reversionary right has not been fully parted with; in other words, that the testator has died intestate as to this right, so that if the contingent event hap-

<sup>1</sup> *Ellis v. Page*, 7 Cush. 161, 163; *Rotch v. Rotch*, 173 Mass. 125; *Johnson v. Webber*, 33 Atl. Rep. 506 (Conn.); *Thomas v. Miller*, 43 N. E. Rep. 848 (Ill.); *Wadsworth v. Murray*, 55 N. E. Rep. 910 (N. Y.); *Eldred v. Davis*, 181 Mass. 498; *Wood v. Bullard*, 151 Mass. 324, and cases cited on p. 335; *Peck v. Carleton*, 154 Mass. 233; *Childs v. Russell*, 11 Met. 16; *Abbott v. Bradstreet*, 3 Allen, 587; *Minot v. Tappan*, 127 Mass. 338; *Minot v. Tappan*, 122 Mass. 535; *Dore v. Tarr*, 128 Mass. 38; *Cloud v. Calhoun*, 10 Rich. Eq. 358 (S. C.); *Rand v. Butler*, 48 Conn. 293; *Webster v. Morris*, 66 Wis. 368, 392, 393; *Evans v. Harlee*, 9 Rich. Law, 501; *Hackney v. Griffin*, 6 Jones Eq. 384; *Hale v. Hobson*, 167 Mass. 400; *Whipple v. Fairchild*, 139 Mass. 262; *Keniston v. Mayhew*, 169 Mass. 166; *Rotch v. Loring*, 169 Mass. 199; *Post v. Jackson*, 39 Atl. Rep. 151, 153 (Conn.).

<sup>2</sup> *Jackson v. Hilton*, 16 Johns. 96; *Conner v. Warring*, 52 Md. 733; 4 Kent's Com. 388; *Brown v. Lawrence*, 3 Cush. 397, 398.

<sup>3</sup> See the authorities in note 1, above.

pens upon which the heirs are to take, it is by inheritance that they take it, as heirs in the technical sense, under the statute of descent; and, as above mentioned, they are ascertained under modern law at the time of the testator's death.

The text-books generally inform us that the reason why there is a preference for the heirs of the testator taking by descent, is that that is the preferable title. We think this is rather misleading. Of various reasons given, we think the following two are the best: First, we remember the Statute of Marlebridge, which we considered in connection with the rule in Shelley's Case, and there we found a feudal reason for preferring that an heir should take by descent rather than by purchase; and that is one of the reasons given for this principle relating to wills.<sup>1</sup> Secondly, another reason is, that under the old law purchasers were not liable for the debts of the deceased landowner; nor, indeed, was the heir liable for a simple contract debt, but he was liable for the specialty debts of the ancestor, provided that the heir was named in the specialty. Therefore, in order to make him pay the debts of his ancestor and not take the land free of these debts, in this particular case it was better to make him take by descent.<sup>2</sup> A reason given by modern judges sometimes is, that the law prefers vested to contingent rights, and that to let the heir take by descent vests it in him immediately at the testator's death.<sup>3</sup> But, unfortunately, this will hardly afford an explanation for so ancient a rule of law; because, as above shown, under the old law the heir was ascertained at a future time in either case. It has also been said that the best reason is that it is more reasonable to suppose that the testa-

<sup>1</sup> Smith's Essay, §§ 390, 419.

<sup>2</sup> Mackin v. Haven, 58 N. E. Rep. 448, 451 (Ill.); 2 Jarman on Wills (6th ed. by Bigelow), 1430, note 1; 2 Black. Com. 465, note by Chitty (Shars. ed.); 2 Pollock & Maitland, 345; Myers v. Wager, 42 Atl. Rep. 281 (N. J.); Ransom v. Brinkerhoff, 38 Atl. Rep. 923 (N. J.); Hargrave's Tracts, 567; Smith's Essay, § 420; Cougar v. Bradey, 42 Atl. Rep. 415 (N. J.).

<sup>3</sup> Heard v. Read, 169 Mass. 222.

tor intended that those persons should take as heirs who should be such at his death.<sup>1</sup> So far as a test can be found, it is this: strike out from the will the clause conferring the gift upon the testator's heirs, and if, without that, they would take by descent in the same shares and proportions that they would take under the will, then the gift to them is void and they take by descent.<sup>2</sup> The same rule applies in gifts by deed where the grantor winds up with an ultimate gift to his own heirs. Presumably the gift is void, but only presumably.<sup>3</sup>

It is not uncommon for a testator to make a devise to A for life, and after A's death to the testator's heirs at law. Following out the simple system above explained, the gift to the heirs is presumably void. Hence they take as heirs by descent, and are ascertained at the testator's death, and, of course, are entitled to the possession upon the death of A. But it is so natural to think of this as a vested remainder in the heirs, that it is not uncommon for the courts to call it a vested remainder.<sup>4</sup> The result is precisely the same in this case, whether the gift to the heirs be held void, or whether it be held good as a vested remainder. Now, for the sake of symmetry, we prefer to say that it is a void gift, rather than to say that it is an exception to the rule.

*Sears v. Russell*<sup>5</sup> is one of a great number of cases in which

<sup>1</sup> *Heard v. Read*, 169 Mass. 222.

<sup>2</sup> *Ellis v. Page*, 7 Cush. 164; *Sears v. Russell*, 8 Gray, 94; 3 Shars. & Budd, 450; *Latrobe v. Carter*, 34 Atl. Rep. 473 (Md.).

<sup>3</sup> *Wills v. Palmer*, 2 Wm. Black. 687; s. c. 5 Burr. 2615; *Bowditch v. Jordan*, 131 Mass. 321; *Watkins on Descents*, 179, 180; *Moore v. Simkin*, 31 Ch. Div. 95; *Akers v. Clark*, 56 N. E. Rep. 296 (Ill.).

<sup>4</sup> *Brown v. Lawrence*, 3 Cush. 390, 396-399; 2 Shars. & Budd, 295; *Buzby's Appeal*, 61 Penn. St. 111; *Hersee v. Simpson*, 48 N. E. Rep. 890 (N. Y.); *Lewis v. Shattuck*, 173 Mass. 486; *Smith v. Allen*, 55 N. E. Rep. 1057, 1058 (N. Y.).

<sup>5</sup> *Sears v. Russell*, 8 Gray, 86, 94, 96. For further cases involving this point, see *Wood v. Bullard*, 151 Mass. 324, and cases cited on page 335; *Webster v. Morris*, 66 Wis. 368, 392, 393; *Evans v. Harlee*, 9 Rich. Law, 501; *Hackney v. Griffin*, 6 Jones Eq. 384; *Evans v. Godbald*, 6 Rich.

the gift to the testator's heirs was held to be effectual; in other words, that the clause was not void on account of the rule we are now considering, therefore, that they were to be ascertained as of the future time, and that the gift to them was an executory devise, and in this case this executory devise was pronounced void, as too remote, because of the rule against perpetuities.

When we come to deal with the reports and the enormous mass of adjudicated cases containing gifts to "heirs," and gifts to "issue" in wills, we will find that these words are very often construed other than in their strict sense. Thus, in more or less cases the word "heirs" has been held to mean "children," and so has the word "issue."<sup>1</sup>

In explaining two cases now to be mentioned, we wish to speak of a transmissible interest in personal property. When we are dealing with an estate of inheritance in real estate, we say that it "descends" to the "heirs" under the statute of descent. Now, the statute of distributions is the statute under which personal property is transmitted, and when personal property is for more than a life interest it is spoken of as an absolute or transmissible interest. We cannot call it a fee, because there is no fee in personal property, and, just as real estate descends to the heirs by the statute of descent, so per-

Eq. 26; *Fargo v. Miller*, 150 Mass. 225; *Peck v. Carleton*, 154 Mass. 231; *Haddock v. Perham*, 70 Ga. 572; *Welch v. Brimmer*, 169 Mass. 204; *Heard v. Read*, 169 Mass. 223, 224; *Godwin v. Banks*, 40 Atl. Rep. 268 (Md.); *De Wolf v. Middleton*, 31 Atl. Rep. 271 (R. I.); *In re McKee's Estate*, 47 Atl. Rep. 993 (Penn.).

<sup>1</sup> *Griffin v. Ulin*, 39 N. E. Rep. 254, 255 (Ind.); *Fishback v. Joesting*, 56 N. E. Rep. 62 (Ill.); see cases cited in 2 *Jarman on Wills* (6th ed. by Bigelow), 756, note 1, 905, note 2, 934, note 1; *Hawkins on Wills* (2d Am. ed.), 92, note 2; *Tucker on Wills* (Mass.), 70; *Ward v. Saunders*, 3 Sneed, 387; *Putnam v. Gleason*, 99 Mass., on p. 456; *Otis v. Prince*, 10 Gray, 581, 582; *Hills v. Barnard*, 152 Mass. 72, 73; *Campbell v. Noble*, 19 So. Rep. 28 (Ala.); *Strain v. Sweeney*, 45 N. E. Rep. 201 (Ill.); *Jackson v. Jackson*, 153 Mass. 377; *Chwatal v. Schreiner*, 43 N. E. Rep. 166, 168 (N. Y.); *Arnold v. Alden*, 50 N. E. Rep. 704 (Ill.); *In re Birks* (1900), 1 Ch. 417; *In re Steinmetze's Estate*, 45 Atl. Rep. 663 (Penn.); *Mitchell v. Mitchell*, 47 Atl. Rep. 325, 327 (Conn.).

sonal property is transmitted to the distributees under the statute of distributions. The word "absolute" is used in so many different senses in the law that we prefer the word "transmissible," which the best authorities often use. In *Hickling v. Fair*<sup>1</sup> there was a bequest to the testator's daughters for life, and then over to their issue, and in default of issue to go over. First, we will point out that you need not think of the rule in *Shelley's Case* in this connection, because this was a gift of personal property. As to the failure of issue clause, it was a definite failure clause, if, for no other reason, than that under the English statute indefinite failure clauses are now very uncommon. Now, a child of a daughter predeceased her and left no issue. Afterwards the daughter died leaving issue. The question was, whether this predeceasing child had a vested interest, which was transmitted under the statute of distributions to its representatives; or whether the interest was contingent in the issue until the death of the daughter. The House of Lords held that the great rule favoring the vesting of interests should be applied, and that the interest vesting in the child was transmitted at its death to its representatives under the statute of distributions. Yet, though vested, it was defeasible upon a condition subsequent, because had the daughter died without leaving issue, that interest would have been divested. To treat the word "issue" as the House of Lords did was to make it mean practically the same as "children." On the other hand, in *Hills v. Barnard*<sup>2</sup> it was held, in that particular case, that the word "issue" should not be taken to mean "children." The gift in the will was to A for life, and then over to A's issue, and from and after the death of A without issue (definite failure), to the testator's nephews and nieces who should be living at the death of A, the issue of a nephew

<sup>1</sup> *Hickling v. Fair* (1899), App. Cas. 15.

<sup>2</sup> *Hills v. Barnard*, 152 Mass. 67; see further, *Jackson v. Jackson*, 153 Mass. 377; *In re Crane*, 58 N. E. Rep. 47, 48 (N. Y.). Compare *Gardiner v. Savage*, 182 Mass. 521, with *Hickling v. Fair* (1899), App. Cas. 15.

or niece deceasing to take the parent's share. Some of the nephews and nieces died before A, leaving issue, and some of this issue also died before A. The question was, whether the contingent element extended also to the gift to the issue of the nephews and nieces, and the court held that it did, so that the issue thus deceasing failed to take. Now, says the court, it would be otherwise were we to construe the word "issue" as meaning "children;" for in such a case the children would have taken an indefeasible interest which would have been descendible or transmissible upon their decease. In an earlier chapter we discussed the subject of limitations over to "children," and showed how that, upon vesting in interest, these remainders open to let in the after-born.

For the purpose of the following discussion we will use the word "descend" instead of the more comprehensive expression "descend or be transmitted," above explained. In the following discussion we will understand that we are talking about a fee in real estate or a transmissible interest in personalty, and, for convenience, as above stated, we will use the word "descend." In *Hickling v. Fair*, above, we find that the court held that the interest descended because it was vested, and it is to be observed that it was defeasible upon a condition subsequent. Now, we have two propositions: First, a vested interest may descend because it is vested (*Hickling v. Fair*). Second, and we have stated this in an earlier chapter, it is no test whatever of an interest's being vested because it will descend. As to the first of these propositions, take the case of *Blanchard v. Blanchard*,<sup>1</sup> which we discussed in an earlier chapter, in which we found that there was a vested remainder defeasible upon a condition subsequent, but that it could not descend while still a remainder. *Blanchard v. Blanchard* was a devise of real estate to the testator's widow for life, and then over in fee to five of his children. There was a provision, that in case of the death of any of the children before the

<sup>1</sup> *Blanchard v. Blanchard*, 1 Allen, 223.



widow, their share or shares should go over to the survivors. Now, if we compare these two cases of *Hickling v. Fair* and *Blanchard v. Blanchard* we find that both are vested and both are defeasible upon conditions subsequent, but that in the one case the interest may descend and in the other case it cannot descend. Thus we see that a vested interest may descend because it is vested, but not necessarily. Now, there is nothing technical or arbitrary about this. It is so because it could not be otherwise. The second proposition is plainly illustrated, as shown in an earlier chapter, by the limitation to A till B returns from Rome, and after his return to C in fee. The above two propositions differ from each other as widely as possible. Now that we have examined the second class of the executory devise we have another argument which we could not use earlier, and we think each argument equally conclusive. The period of the rule against perpetuities, when lives in being cannot be taken as the measure, is twenty-one years. Now it is universally conceded that the rule against perpetuities does not apply to vested interests. Suppose, then, that there be a devise to A and his heirs from and after twenty-three years. This is an executory devise of the second class. There is no doubt that it is void as too remote, because it is executory and not vested, and yet upon the death of A at any time it will descend to his heirs.

There is an enormous class of cases of bequests or devises to A for life and after his death to his heirs, in which it has been held that the heirs are to be ascertained at the death of A (*nemo est hæres viventis*).<sup>1</sup> Now, it is evident (1) that in

<sup>1</sup> See cases in 2 Jarman on Wills (6th ed. by Bigelow), 756, note 1, 905, note 2, 934, note 1.

In *Clarke v. Cordis*, 4 Allen, 466, 480, where the limitation over, subject to an estate for life in the ancestor, was to the heirs, and was so limited that it might not take effect immediately upon the death of the ancestor, they were yet held to be ascertained at the death of the ancestor. See further, *Harrison v. Jones*, 82 Ga. 599; *Mercer v. Safe Company*, 45 Atl. Rep. 865 (Md.).

And in some cases of limitations to the heirs of a person other than

such cases the word "heirs" cannot mean "children," because, as already shown, they would take vested remainders opening to let in the after-born; (2) it is obvious that the rule in Shelley's Case cannot have been applied, and this because either the subject-matter was personalty, or because the rule in Shelley's Case had been modified or abolished by statute in that particular jurisdiction; (3) there is a class of cases containing gifts to the heirs of A, now living, and in these cases the word "heirs" is used in a popular sense, the intention of such language being that the maxim *nemo est hæres viventis* is not to be applied, as we have shown in an earlier chapter. Whenever we come across cases of gifts to A for life and then over to his heirs, in which the heirs have been held to be ascertained at the death of A, we may know that the cases must be comprehended in the light of these three propositions, for such cases can come under neither one of these three propositions. It is held in *Gardiner v. Fay*,<sup>1</sup> that in a deed the word "heirs" is as a rule to be taken in its technical sense, so that the principle of *nemo est*, etc., applies, and the joint heirs of a husband and wife are the heirs of both of them, ascertained as of the time of the death of the survivor.

In *Putnam v. Gleason*<sup>2</sup> there was a devise of real estate to A for life and then to her heirs. The Massachusetts statute the testator, the heirs have been held to be ascertained not as of the death of the ancestor but at a later time. *Knowlton v. Sanderson*, 141 Mass. 325; *Pinder v. Pinder*, 28 Beav. 47, 48; *Stockbridge v. Stockbridge*, 99 Mass. 244; *Fargo v. Miller*, 150 Mass. 225; *Simms v. Garrot*, 1 Dev. & Bat. Eq. 396; *Knight v. Knight*, 3 Jones Eq. (N. C.), 167; *Ingram v. Smith*, 1 Head (Tenn.), 411; *Putnam v. Story*, 132 Mass. 205; *Tillinghast v. Cook*, 9 Met. 143; *Lombard v. Boyden*, 5 Allen, 249; *Smith's Essay*, §§ 210 *et seq.*; *Howard v. Trustees*, 41 Atl. Rep. 156 (Md.); *In re Baer*, *Nathan v. Hendricks*, 41 N. E. Rep. 702 (N. Y.).

In some cases in which there was a limitation to A for life, and then over to the heirs of B, and B survived A, the strict rule of *nemo est hæres viventis* was applied, leaving a contingent remainder in the heirs, which failed to take effect. See cases in 2 Jarman on Wills (6th ed. by Bigelow), 756, note 1, 905, note 2, 934, note 1.

<sup>1</sup> *Gardiner v. Fay*, 182 Mass. 492.

<sup>2</sup> *Putnam v. Gleason*, 99 Mass. 454.

prevented the operation of the rule in Shelley's Case, and the principle *nemo est*, etc., applied, and the heirs took a contingent remainder, and, of course, were ascertained at the death of A. Now the court expressly points out in this case that it would be otherwise if they should take the word "heirs" to mean "children." Sometimes there is a gift in a will to the heirs of a person mentioned as now deceased. Evidently these heirs could be ascertained, first, as of the time the person died; secondly, as of the time when the testator wrote the gift into his will; thirdly, as of the time of the testator's death, at which time, of course, the will takes effect; fourthly, at some future time, when the estate should come into possession. But the rule is that the heirs are to be ascertained as of the time of the testator's death.<sup>1</sup>

There is a great mass of cases in hopeless confusion and contradiction relating to restraints upon marriage, and we shall presently discuss a very few of them and then sum up the matter into five classes. The principle of *nemo est*, etc., was applied in *Otis v. Prince*,<sup>2</sup> and the restraint, therefore, held to be void. It was a devise of real estate to the testator's grandson "so long as he shall remain unmarried," and then to his heirs. He afterwards married, and it was held that his estate was not divested, because there was no valid limitation over, for that he could not have an heir until he should die. In *Knight v. Mahoney*<sup>3</sup> there was a devise of real estate to the testator's widow "so long as she remains my widow." There was no limitation over. This was held to be a good restraint. In *Parsons v. Winslow*<sup>4</sup> there was a bequest to the testator's widow and a provision restraining her from marry-

<sup>1</sup> *Swallow v. Swallow*, 166 Mass. 243; *Ruggles v. Randall*, 38 Atl. Rep. 885; *Hawkins on Wills* (2d Am. ed.), 94; *Healey v. Healey*, 39 Atl. Rep. 793 (Conn.); *In re Musther*, 43 Ch. Div. 569; *In re Chinery*, 39 Ch. Div. 614; *Burton v. Gagnon*, 54 N. E. Rep. 279 (Ill.); *Lancaster v. Lancaster*, 58 N. E. Rep. 462 (Ill.).

<sup>2</sup> *Otis v. Prince*, 10 Gray, 581.

<sup>3</sup> *Knight v. Mahoney*, 152 Mass. 523.

<sup>4</sup> *Parsons v. Winslow*, 6 Mass. 169.

ing with a limitation over, in the event of her marriage, to persons who were the testator's heirs at law. Now, this limitation over to the testator's heirs at law was void, for the reason above pointed out, so that there was no valid limitation over. The restraint was held to be void, because there was no valid limitation over. We infer from *Knight v. Mahoney*, above, that were the question in *Parsons v. Winslow* to come up to-day, *Parsons v. Winslow* would not stand; but the cases can be distinguished, in that *Knight v. Mahoney* was real estate and *Parsons v. Winslow* was personal property. The number of cases upon the subject of restraint of marriage is immense, and, as already mentioned, they are in great confusion. We select these three Massachusetts cases out of the mass, and in the foot-note give a list of citations in which many of the cases can be found, together with explanations and commentaries upon them.<sup>1</sup> We think that these authorities will show that restraints upon marriage are more likely to be upheld in the following classes of cases than in other cases; but the authorities are in such conflict that all that can be said is that the restraint is more likely to be upheld. Restraints upon marriage are more likely to be upheld: First, when the gift is to the testator's widow, and it is said that the same principle applies to gifts to widows in general. Secondly, when the subject-matter is real estate the restraint is more likely to be upheld. The ecclesiastical courts of England formerly had jurisdiction over the succession to personal property, and the ecclesiastical law favored marriage. In those states of the United States in which the ecclesiastical law has been adopted we find a disposition in the case of personal property, to hold the restraint void. Thirdly, restraints are more likely to be upheld when the words are words of

<sup>1</sup> 2 Jarman on Wills (Randolph & Talcott's ed.), 45, note 32; 2 Jarman on Wills (6th ed. by Bigelow), 886, note 4; 6 Harv. Law Rev. 208, 209; 12 Law Quart. Rev. 36; 10 Harv. Law Rev. 372; 14 Harv. Law Rev. 614; *Morley v. Richardson* (1895), 1 Ch. 449; *Hampton v. Nourse* (1899), 1 Ch. 63.

limitation than when they are words of condition subsequent; yet in *Otis v. Prince* the restraint was held void, as before shown, but the words were words of limitation. Conditions are spoken of as *in terrorem*, and not to be favored. Fourthly, if there be a limitation over, the restraint is more likely to be upheld, and we have seen this principle above manifested in this way, that the restraint was held void because there was no valid limitation over. Fifthly, the courts will uphold restraints if they can see that the gift was for the maintenance of the devisee or legatee, until he or she find a support by marriage.

The books are filled with late cases on the following topics. If there be a devise of real estate to A and his heirs, or in any other words calculated to give A a fee, with a provision that what shall remain at his death shall go over, the limitation over is void as repugnant. It is not an executory devise over. It is not even a bad executory devise. It is nothing at all, for the testator has given A a fee, and then has undertaken to say, in effect, it is not a fee at all. He has undertaken, after giving a fee, to say, if A does not convey, or consume the proceeds of this property, then I give it, or what shall remain of it, to somebody else at his death.<sup>1</sup> In an early

<sup>1</sup> *Kelley v. Meins*, 135 Mass. 234, 235; *Stocker v. Foster*, 178 Mass. 591; *Sawin v. Cormier*, 179 Mass. 420; *Gifford v. Choate*, 100 Mass. 346; *Kent v. Morrison*, 153 Mass. 137; *Hatfield v. Sohier*, 114 Mass. 52; *Welsh v. Woodbury*, 144 Mass. 542; *Shaw v. Hussey*, 41 Me. 495; *Wright v. Miller*, 8 N. Y. 1; *Davis v. Badlam*, 165 Mass. 248; *Skinner v. McDowell*, 48 N. E. Rep. 310 (Ill.); *In re Schmidt's Estate*, 37 Atl. Rep. 928 (Penn.); *In re Jones*, *Richards v. Jones* (1898), 1 Ch. 438; *Wooster v. Fitzgerald*, 39 Atl. Rep. 679 (N. J.); *Numsen v. Lyon*, 39 Atl. Rep. 533, 534 (Md.); *In re Kimball's Will*, 40 Atl. Rep. 848 (R. I.); *Rusk v. Zuck*, 46 N. E. Rep. 674 (Ind.); *In re Jenks*, 43 Atl. Rep. 871 (R. I.); *Shapleigh v. Shapleigh*, 44 Atl. Rep. 107 (N. H.); *In re Tilton*, 44 Atl. Rep. 223 (R. I.); *Mansfield v. Shelton*, 35 Atl. Rep. 271 (Conn.); *Beuz v. Fabian*, 35 Atl. Rep. 760 (N. J. Ch.); *Hunt v. Hawes*, 54 N. E. Rep. 953 (Ill.); *Taylor v. Brown*, 33 Atl. Rep. 664 (Me.); *Saeger v. Bode*, 55 N. E. Rep. 129, 131 (Ill.); *Lambe v. Drayton*, 55 N. E. Rep. 189 (Ill.); *Security Co. v. Cone*, 31 Atl. Rep. 12, 13 (Conn.); *Rawley v. Sanns*, 40 N. E. Rep. 674 (Ind.); *Gilchrist v. Empfield*, 45

chapter we found that a fee simple must be free from all restrictions, qualifications, and conditions, and here is an illustration of that ancient principle of law. We felt that we could better introduce this matter in connection with the executory devise than in the first few chapters. The above case is entirely different from the case of the determinable fee with a valid executory devise over, an illustration of which would be, to A and his heirs, and if he die without issue (definite failure) to B and his heirs. Another illustration would be to A and his heirs, and if B pay him one hundred dollars, then to B and his heirs. These are cases of good determinable fees with good executory devises over. But if the first taker be given an estate for his life with a limitation over of what shall remain at his death, this limitation over is perfectly good. Here there is nothing repugnant whatever. It is simply a case of a life estate with a power given the tenant to consume the property, and, moreover, the gift over is a good vested remainder.<sup>1</sup> We called attention to this last proposition in connection with remainders opening to let in the after-born, and pointed out how that the contingency that the remainderman might never receive

Atl. Rep. 46 (Penn.) ; *Rinkenberger v. Meyer*, 56 N. E. Rep. 913 (Ind.) ; *Cameron v. Parish*, 57 N. E. Rep. 547 (Ind.) ; *Stewart v. Stewart*, 57 N. E. Rep. 885 (Ill.) ; *Morse v. Natick*, 176 Mass. 510 ; *Trout v. Rominger*, 47 Atl. Rep. 960 (Penn.) ; *Bryan v. Bryan*, 48 Atl. Rep. 341 (N. J. Ch.) ; *Lovett v. Farnham*, 169 Mass. 1, 6 ; *Yetzer v. Brisse*, 42 Atl. Rep. 675 (Penn.) ; *Russell v. Werntz*, 44 Atl. Rep. 219 (Md.) ; *Meis v. Meis*, 35 Atl. Rep. 370 (N. J. Ch.) ; *Lewis v. Shattuck*, 173 Mass. 483, 486 ; *Sise v. Willard*, 164 Mass. 48 ; *Simonds v. Simonds*, 168 Mass. 145, 146 ; *Bentz v. Bible Society*, 37 Atl. Rep. 708 (Md.) ; *Keniston v. Mayhew*, 169 Mass. 166 ; *Fogler v. Titcomb*, 42 Atl. Rep. 360 (Me.) ; *Lomax v. Shinn*, 44 N. E. Rep. 495 (Ill.) ; *Chase v. Ladd*, 153 Mass. 126. If there be a life estate with power to sell for life tenant's maintenance, and with remainder over of what shall remain ; if the life tenant sell, he is bound to exercise diligence in securing a proper price for the land ; and, if he fails to do so, the remainderman may have the conveyance set aside in equity ; at least, if the purchaser takes with notice. *Price v. Bassett*, 168 Mass. 598 ; *Stocker v. Foster*, 178 Mass. 591.

<sup>1</sup> See the authorities in note 1, page 255, above.

any of the estate, did not affect the nature of the remainder, for that if there were no other contingency, it would be a vested remainder. These same principles apply when the subject-matter is personalty. If the first taker be given a transmissible interest in the personalty, the limitation over of what shall remain at his death is void as repugnant; but if he be given a mere life interest, the limitation over is good.<sup>1</sup>

In line with the cases already considered, of limitations of fees with a limitation over of what shall remain undisposed of at the first taker's death, there are cases of the following kinds : Devise to A and his heirs, and if he die intestate, then over. This means, devise to A and his heirs, and if he does not dispose of the property by his will, then it is to go over. Such a provision is inconsistent with the gift in fee, and the limitation over is void as repugnant.<sup>2</sup> Another form is, to A and his heirs, and if he does not dispose of the property in his lifetime, then over. Ordinarily this means, does not convey by deed.<sup>3</sup> There is a recent Massachusetts case, *Burbank v. Sweeney*,<sup>4</sup> in which, under very peculiar circumstances, the court held that upon the whole will, taken together, such language would empower the person entitled, who was the testator's widow, to dispose of it also by her

<sup>1</sup> *Welsh v. Woodbury*, 144 Mass. 542, 545 and cases cited; *Collins v. Wickwire*, 162 Mass. 143; *Scott v. Perkins*, 28 Me. 22; *In re La Bar's Estate*, 37 Atl. Rep. 111 (Penn.); *Little v. Geer*, 37 Atl. Rep. 1056 (Conn.); *Robeson v. Shotwell*, 36 Atl. Rep. 780 (N. J.); *In re Tyson's Estate*, 43 Atl. Rep. 131 (Penn.); *Hunt v. Smith*, 43 Atl. Rep. 428 (N. J. Ch.); *Small v. Thomson*, 43 Atl. Rep. 509 (Me.); *Mansfield v. Shelton*, 35 Atl. Rep. 271 (Conn.); *Gross v. Strominger*, 35 Atl. Rep. 852 (Penn.); *In re Geist's Estate*, 44 Atl. Rep. 437 (Penn.); *Wooster v. Cooper*, 33 Atl. Rep. 1050 (N. J.); *Security Co. v. Pratt*, 32 Atl. Rep. 396 (Conn.); *In re Shade's Estate*, 45 Atl. Rep. 649 (Penn.); *Tilton v. Tilton*, 47 Atl. Rep. 256 (N. H.); *Dubois v. Van Vallen*, 48 Atl. Rep. 241 (N. J. Ch.).

<sup>2</sup> 2 *Jarman on Wills*, 75; *Karker's Appeal*, 60 Penn. St. 155; *Gray on Restraints*, §§ 56-74 (2d ed.); *Foster v. Smith*, 156 Mass. 382; *Hunting v. Damon*, 160 Mass. 441; *Knight v. Knight*, 162 Mass. 460; *Burton v. Gagnon*, 54 N. E. Rep. 279 (Ill.).

<sup>3</sup> See the authorities in note 2, above.

<sup>4</sup> *Burbank v. Sweeney*, 161 Mass. 490.

will. Now, gifts in fee, with a provision that if the beneficiary does not dispose of the property in his lifetime it is to go over, are absolute fees simple; that is, the limitation over is void as repugnant. It is evident in all such cases, and in cases like that above given of limitations in fee with a provision that if the beneficiary die intestate the estate shall go over, that there is an attempt to prevent the free alienation of the estate, which limitation or restriction upon a fee simple is not allowed; and so in the case of personal property, if a transmissible interest be given, all such limitations or restrictions are void.

Following along the same line of the purity of the fee simple we have the great principle of the common law, which makes a general restraint upon the alienation of a fee to be a void restraint. This is a very elementary principle of law, and one of very great practical importance; and what is true of a fee is equally true of a transmissible interest in personal property. Any gift, then, of a fee in real estate, or of a transmissible interest in personal property with a provision that the property shall not be alienated, confers a pure fee simple in the one case, and an absolute interest in the other case, and the general restraint is absolutely void. And so, if there be a limitation over in the event of alienation, this limitation over is void as repugnant.<sup>1</sup>

As to the determinable fee subject to an executory devise over, the owner thereof can pass all the interest he has in it, but, as before shown, cannot impair the gift over in any way.<sup>2</sup>

<sup>1</sup> Gray on Restraints (2d ed.) §§ 23, 27; *Metcalfe v. Metcalfe*, 43 Ch. Div. 639; *In re Dugdale*, 38 Ch. Div. 176; *Van Grutten v. Foxwell* (1897), App. Cas. 693; *Kaufman v. Burgert*, 45 Atl. Rep. 725 (Penn.); *Mut. Ins. Co. v. Rector*, 32 Atl. Rep. 691 (N. J. Ch.).

<sup>2</sup> 4 Kent's Com. 10; *Kelley v. Meins*, 135 Mass. 234.

Sometimes there is an estate in possession with a contingent remainder over, or an executory devise over or a power of appointment; and because the people are unborn, or are not ascertained, it is not possible to give a perfect title to the property, without the assistance of the courts, and yet it may be very desirable that the property be sold. The Massachusetts



It is often very inconvenient that estates should be locked up from alienation by the existence of limitations over.

Next, as to the alienability or devisability of the executory devise. As has already appeared in earlier chapters, anything may be released, even at common law, and so, of course, may an executory devise;<sup>1</sup> but an executory devise is not assignable at law. It is, however, devisable at law, and it is both assignable and devisable in equity,<sup>2</sup> and modern statutes have very generally made the executory devise to be alienable, so that the assignment would be as good at law as in equity.<sup>3</sup>

We now come to the third class of the executory devise. This class of the executory devise concerns personalty exclusively. If personalty be bequeathed to A for life, and after his death to B, the interest of B is an executory devise of the third class. Of course, if the subject-matter were real estate, B would have simply a vested remainder. The view which has been very generally entertained is that the interest of B is an executory devise, whether the subject-matter be a chattel real or a chattel personal, and we shall soon see that it is a

statutes provide for such contingencies by application to the court to order a sale and have the proceeds put in trust, and the different estates which the parties had in the subject-matter are transferred to the fund; and the late Massachusetts statutes (1897, ch. 136, 1895, ch. 183) extend this principle even to the case where the limitation over is a vested remainder, or where there is a reversion. Mass. Rev. Laws, ch. 127, §§ 28, 30-32; *Whitcomb v. Taylor*, 122 Mass. 243, 246, 250.

A court of equity may order a sale of an estate which has been limited to one for life with a remainder over, provided that the life tenant cannot protect the property from danger of loss from non-payment of taxes, etc. *Garvin v. Curtin*, 49 N. E. Rep. 523 (Ill.).

<sup>1</sup> 2 Wash. R. P. 357, 368; *Gray on Perp.* § 268.

<sup>2</sup> 2 Wash. R. P. 341, 357, 367, 368; *Roe d. Perry v. Jones*, 1 H. Black. 30; *Jones v. Perry*, 3 T. R. 88, 94; *Fearne on Reims.* 548, note f; *Watkins on Conv.* (8th ed.) 217, 218; *Gray on Perp.* § 268; *Jarman on Wills* (6th ed. by Bigelow), 49.

<sup>3</sup> *Gray on Perp.* § 268.

It was held in *Godwin v. Banks*, 40 Atl. Rep. 268 (Md.), that an executory devise to the testator's heirs ascertainable at a future time was not assignable so as to pass in insolvency.

matter of every-day experience to treat these limitations over of personalty as vested and not as executory; still, they have been regarded as technically executory.<sup>1</sup>

<sup>1</sup> 2 Kent's Com. 352; 4 Kent's Com. 269, 270; 2 Wash. R. P. 374-376; Gray on Perp. §§ 84-88, 90 and note 3.

Professor Gray in 14 Harv. Law Rev. 397 proposed the doctrine that if the subject-matter were a chattel personal, the limitation over after a life interest would not be an executory devise or bequest, even technically, and that, if there were no contingency, it would not only be practically vested but even technically vested. We shall have occasion to consider this matter later.

## CHAPTER XXI.

LIMITATIONS HAVING REFERENCE TO THE ATTAINMENT  
OF A GIVEN AGE.

WE will now take up the subject of limitations made with reference to the attainment of a given age. First, as to real estate. The tendency of the law here, as everywhere, in an equivocal case, is to treat the interest as vested, and not as contingent. These cases are, some of them a limitation to an individual, some to several individuals, some to a class of persons; for example, children, grandchildren, nephews, nieces, etc. We introduce the subject partly for its intrinsic value, partly because it is an excellent foundation for the study of the rule against perpetuities, to be soon taken up. *Boraston's Case*<sup>1</sup> is a great landmark, and, although a real property case, has been often relied on as a guide in bequests of personalty. It is one of *Tudor's* leading cases. It was a devise to X for eight years, then to the testator's executors to employ the profits of the land for the payment of the testator's debts until A, the eldest son of the testator, shall attain the age of twenty-one years, and when A shall attain that age, then to him and his heirs. A died without attaining that age. It was held that he had a vested interest, and that the land descended to his heir. The case of *Bromfield v. Crowder*<sup>2</sup> (and it has been cited and relied on as a great authority in England and America) was a devise of real estate to A and B for their lives in succession, and then over to C and his heirs, "if he

<sup>1</sup> *Boraston's Case*, 3 *Coke's Rep.* 18 b.

<sup>2</sup> *Bromfield v. Crowder*, 1 B. & P. (N. R.) 313; s. c. 14 *East*, 604; s. c. 16 *East*, 412.

shall live to attain the age of twenty-one years," and, in case he die under that age, then over to D and his heirs. C had not attained the age required when the estates of A and B had expired, so that it was claimed that his remainder had failed, because it could not take effect in possession, that is, could not arise, at the expiration of the particular estates. But the court held that it was a vested remainder, and took effect in possession at the expiration of the particular estates, and that the provision "if he shall live to attain," etc., was perfectly satisfied by the limitation over to D; that is to say, that it was a vested remainder defeasible upon the condition subsequent of his not reaching the age, and that it was not a contingent remainder, contingent upon his reaching the age. *Festing v. Allen*<sup>1</sup> is a troublesome case. It has been cited many times, and of late has been much disapproved of.<sup>2</sup> It was a devise of real estate to trustees in trust for A for life, and then to the children of A who shall attain the age of twenty-one. There was a limitation over in the event of the failure to attain that age. At the death of A some of the children had, and some had not, attained the age. It was held to be a contingent remainder, and that those who had not attained the age at the death of A failed to take. The decision is objectionable, first, because the existence of the limitation over might well have caused the court to treat it as vested but defeasible, as the court did in *Bromfield v. Crowder*, above. It is also objectionable because it is inconceivable that any testator would have intended such a result. The effect was to give the property to people who had grown up, and to deprive children who had not reached maturity of what they might need for their maintenance; all upon the accident of the parent of these children dying at some particular time or times. We think that the immense amount of

<sup>1</sup> *Festing v. Allen*, 12 M. & W. 301, 302; s. c. 5 Hare, 573.

<sup>2</sup> *Trull v. Jacobs*, 3 Ch. Div. 713; *Blackman v. Fysh* (1892), 3 Ch. 209; *In re Brooke*, *Brooke v. Brooke* (1894), 1 Ch. 43; *Symes v. Symes* (1896), 1 Ch. 272.

verbiage to be found in this will might have enabled the court to treat the case as that of a use upon a use. In point of fact the estates were all held to be legal, and were executed by the Statute of Uses, so that the remainders were legal estates and could be, and were, held to be contingent remainders. The trust was not an active trust, and we think it would not have been a very great strain to have taken the language of the limitations as creating a use in the trustees, and a use upon that use in the life tenant and remaindermen. We do not mean to say that this would have been, strictly taken, a proper construction; but we think the court might have adopted it to save the gifts to the children, as they felt compelled to treat the gifts as contingent, and not as vested but defeasible. Of course, had the construction of a double use been adopted, the estates of the children would have been equitable, and, as shown in an earlier part of this book, the rule that the remainder must arise immediately, etc., applies only to remainders which are legal estates, and does not apply to equitable estates.

In *In re Lechmere and Lloyd*<sup>1</sup> there was a devise of real estate to A for life, and after her death to such of her children living at her death as should attain the age of twenty-one, either before or after her death. At the time of her death some of the children had, and some had not, attained that age. It was held that it was a contingent remainder until her death, and that upon her death those who had not attained the age took as executory devisees, so that they did not lose by not reaching the age when the particular estate expired. There is a late statute in England,<sup>2</sup> and in a few states of this country there are late statutes, which protect contingent remainders from failure because they are not able to take effect in possession upon the expiration of the par-

<sup>1</sup> *In re Lechmere and Lloyd*, 18 Ch. Div. 524 (given in 5 Gray's Cas. on Prop. 82). See further, *Blackman v. Fysh* (1892), 3 Ch. 209; *Dean v. Dean* (1891), 3 Ch. 150. See *Symes v. Symes* (1896), 1 Ch. 272.

<sup>2</sup> Statute 40 & 41 Victoria, ch. 33.

ticular estate.<sup>1</sup> The English statute does not apply to wills executed before the act took effect. Hence it had no application to the above case of *In re Lechmere and Lloyd*. We point out that this class of legislation, obtaining in only a few jurisdictions, and all of it enacted within recent years, must not be confounded with that widely extensive mass of legislation discussed in the last chapter, which protects contingent remainders from destruction in the ways there pointed out.

Turning now to personalty limited by will, the rule is that the law favors the vesting of the legacy, and so we find that both in real estate and in personalty the law favors the vesting. The rules governing the construction of legacies, as to whether they shall be vested or contingent, were derived from the civil law by the ecclesiastical courts of England, and were from them adopted by the English courts of equity.<sup>2</sup> Primogeniture has never applied to the succession to personalty, and Pollock and Maitland<sup>3</sup> explain how the ecclesiastical courts came to get their jurisdiction over the succession to personalty in this way. Primogeniture became established in the twelfth century, as the rule or system for the succession to real estate, and it became impossible for the king's courts, with two such different systems obtaining, to retain their jurisdiction over the succession to chattels, hence their jurisdiction over these slipped into the hands of the ecclesiastical courts. Personalty, as long ago shown by us, is divided into chattels real and chattels personal. The chattel real with which we are here concerned is the term of years. A term of years may be a newly created term, or it may be an existing term. If I lease land to A for ten years, or for one thousand years, this is a newly created term by my act of leasing; but, as belonging to A, the lessee, it is an existing term of years, and is

<sup>1</sup> Williams, R. P. (17th ed., Am. notes) 431.

<sup>2</sup> 1 Jarman on Wills (5th ed. by Bigelow), 833; *In re Prytherch*, 42 Ch Div. 597; Tudor's Lead. Cas. (3d ed.) 842, 856.

<sup>3</sup> 2 Pollock & Maitland, 329-331, 339, 342.

called a leasehold. This leasehold can, of course, be transmitted by will. In very ancient days in England, chattels, even though the chattel might be a term of one thousand years, were regarded as too unsubstantial, of too inferior a quality, to be limited over by will after the testator had given the chattel to somebody for his life. Therefore, if the bequest of the personalty were to A for life, any limitation over of it was void, and A took it forever. This view passed away ages ago, and ever since limitations over subject to a life interest have been good. The ordinary view is that the limitation over in a will comes under the third class of the executory devise, and is an executory devise or bequest, and that, too, whether the subject-matter be an existing term of years, a leasehold, or a chattel personal.<sup>1</sup> But although technically an executory devise or bequest, it is very common to treat it as a vested interest, and it always is treated as a vested interest, unless there be some contingency, as we shall soon see. Executory devises of chattels do not depend at all upon the Statute of Wills of Henry VIII., but are common-law interests.<sup>2</sup>

The rule by which to determine whether a legacy be vested or contingent is expressed in three forms, which three forms all mean the same thing. In many cases the rule has been applied to gifts of personalty and realty together; but the rule is a personalty rule. The rule has been applied in many cases in which the future event was the attainment of a given age by an individual or by a class. But the rule is of much broader application, and is applied also when the future event is something other than the attainment of a given age.<sup>3</sup> The language of wills is very often equivocal, and when it is difficult to determine by the rule whether the legacy be vested or contingent, the leaning of the courts is towards the vesting

<sup>1</sup> 2 Kent's Com. 352; 4 Kent's Com. 269, 270; 2 Wash. R. P. 374-376; Gray on Perp. §§ 84-88, 90 and note 3. See, however, the view of Professor Gray in 14 Harv. Law Rev. 397.

<sup>2</sup> Gray on Perp. § 200 a.

<sup>3</sup> See the authorities in note 2, page 266, below.

of the legacy.<sup>1</sup> One form of stating the rule is: If the gift be distinct from the time of payment, and the payment only be postponed, the legacy is vested; but if there be no gift except in the direction to pay, and the payment is to be made at a future time, for example, on the attainment of a given age, the legacy is contingent. Another form of stating the rule is: If vested language be used, and this be followed by a provision postponing the time of payment or distribution till a future time, the gift is vested; but if the language of the gift be all one with the time of payment or distribution, and that be some future time, the gift is contingent;<sup>2</sup> for ex-

<sup>1</sup> *Eldredge v. Eldredge*, 9 Cush. 519; *Dale v. White*, 33 Conn. 294.

<sup>2</sup> *Tudor's Lead. Cas.* (3d ed.) 844-846. See collection of cases in 1 *Macnaghten & Gordon's Reports* (Perkins' ed.), 354, note, and in 5 *Ves. Jr.* (Sumner's ed.) 509, 513, notes, and in 2 *Williams on Executors* (6th Am. ed.), 1224 *et seq.*, 1225, note (*s*<sup>1</sup>), 1239, note (*a*), 1243, note (*m*); *Furness v. Fox*, 1 Cush. 136; *Eldredge v. Eldredge*, 9 Cush. 516; 1 *Jarman on Wills* (5th Am. ed.), 833 *et seq.*, 837 *et seq.*; *Howe v. Hodge*, 152 Ill. 252; *Hale v. Hobson*, 167 Mass. 399; *In re Wing's Estate*, 48 N. E. Rep. 540 (N. Y.); *Vonder Horst v. Vonder Horst*, 41 Atl. Rep. 124 (Md.); *In re Smith's Estate*, 42 Atl. Rep. 522 (Penn.); *Appeal of Thompson*, 43 Atl. Rep. 951 (Penn.); *Clark v. Cammann*, 54 N. E. Rep. 710, 711 (N. Y.); *Salisbury v. Slade*, 54 N. E. Rep. 743 (N. Y.); *Parker v. Leach*, 31 Atl. Rep. 19 (N. H.); *In re Engle's Estate*, 31 Atl. Rep. 681 (Penn.); *Smith v. Parsons*, 40 N. E. Rep. 736 (N. Y.); *Dusenberry v. Johnson*, 45 Atl. Rep. 104 (N. J. Ch.); *Steinway v. Steinway*, 57 N. E. Rep. 312, 317 (N. Y.); *In re Crane*, 58 N. E. Rep. 48 (N. Y.); *Stewart v. Stewart*, 47 Atl. Rep. 636 (N. J. Ch.); *Webb v. Webb*, 48 Atl. Rep. 95 (Md.); *Wardwell v. Hale*, 161 Mass. 396; *Wright v. White*, 136 Mass. 472; *Eager v. Whitney*, 163 Mass. 466; *In re Murphy*, 39 N. E. Rep. 691 (N. Y.); *Mallory v. Mallory*, 45 Atl. Rep. 164 (Conn.); *Ellicott v. Ellicott*, 45 Atl. Rep. 183 (Md.); *Haines v. Weirick*, 58 N. E. Rep. 712, 713 (Ind.); *Leake v. Robinson*, 2 Mer. 363; *Wadley v. North*, 3 *Ves.* 364; *Walker v. Mower*, 16 *Beav.* 365; *King v. Isaacson*, 1 *Sm. & G.* 371; *Murray v. Tancred*, 10 *Sim.* 465; *Emerson v. Cutler*, 14 *Pick.* 108, 113; *Gifford v. Thorn*, 1 *Stockton Ch.* 702; *Winslow v. Goodwin*, 7 *Met.* 375, 376, 383.

A provision to divide among testator's grandchildren on their reaching a given age, was held to be a vested gift, because of a further provision that it was to be divided equally among all the grandchildren; this being the expression of a gift to all the grandchildren, distinct from any provision for payment. *Howe v. Hodge*, 152 Ill. 252.



ample, a legacy to A at twenty-one years of age; a legacy to A upon his attaining twenty-one years of age; a legacy to A if he shall attain twenty-one years of age; a legacy to A when he shall attain twenty-one years of age. These are all contingent gifts, and if he die under twenty-one the gift fails.<sup>1</sup> Another form of stating the rule is: If it appears to be the testator's intention that his bounty shall immediately attach, and the time of payment be only postponed, the gift is vested; but if the time be annexed to the substance of the gift as a condition precedent, the gift is contingent, and is not transmissible.<sup>2</sup> The number of cases on this subject is great, and collections of them can be found in the books, and late cases are abundant.<sup>3</sup> They consist of applications of the foregoing rules to the varying language of different wills. A good illustrative case of this great class is *Furness v. Fox*.<sup>4</sup> In the last definition the word "transmissible" is used. All that is meant in that definition by that word is, that if the person die under the given age, the gift being contingent upon his attaining that age, the gift is not transmitted to his representatives, but it does not mean that the gift is not a transmissible gift.

When the gift is vested, but the time of payment only is postponed, for example, until the attainment of a given age, and the legatee dies under the age, his executor or administrator is entitled to the immediate possession of the property. He does not have to wait until the time shall arrive when the legatee would have reached the age had he lived.<sup>5</sup>

*Wright v. White*<sup>6</sup> was a case of a will which created an

<sup>1</sup> *Gossling v. Elcock* (1902), 1 Ch. 945; *Tudor's Lead. Cas.* (3d ed.) 845; *Edgerly v. Barker*, 31 Atl. Rep. 900 (N. H.); *Muirhead v. Muirhead*, 15 App. Cas. 301, 302; *In re Jobson*, *Jobson v. Richardson*, 44 Ch. Div. 154. See also the authorities in note 2, page 266, above.

<sup>2</sup> *Furness v. Fox*, 1 Cush. 136.

<sup>3</sup> See the authorities in note 2, page 266, above.

<sup>4</sup> *Furness v. Fox*, 1 Cush. 136.

<sup>5</sup> See the authorities in note 2, page 266, above.

<sup>6</sup> *Wright v. White*, 136 Mass. 472.

active trust of real and personal estate in favor of A for life, and then in behalf of his children living at his death. Evidently the gift was contingent in the children until the death of A. The will further provided for the children taking upon reaching the age of twenty-one, with a provision that the share of any dying under that age should go over to the others. At the death of A some of the children had not reached that age, and the question was whether the language of the gift was vested language or was such as to make the gift contingent upon a member reaching the age. It was held to be a vested gift with the time of payment or distribution only postponed. This was an important point, notwithstanding that the share of a child dying under the age would go over, for the question was whether the children, who had not attained the age at the death of A, were entitled to participate in the income of the property until they should respectively attain the age or die before it. It was held that they were entitled to the intermediate income, because the gift was vested. The rule is that beneficiaries are entitled to the intermediate income, if the gift be vested, unless the income be ordered to be accumulated, and very often it is ordered to be accumulated. The rule further is that they are not entitled to the intermediate income, if the gift be contingent; but this latter rule is subject to various exceptions.<sup>1</sup>

When a legacy is vested, and the time of payment only is postponed, it is said to be *debitum in præsenti, solvendum in futuro*, due now, payable in the future.<sup>2</sup>

Even when the gift and time of payment are not distinct, yet, if the intermediate interest be given to the legatee, the

<sup>1</sup> 2 Jarman on Wills (5th Am. ed. by Bigelow), 168-170; Tudor's Lead. Cas. (3d ed.) 842 *et seq.*; Wright v. White, 136 Mass. 472, 475, 476; *In re Holford* (1894), 3 Ch. 44, 51; *In re Woodin*, *Woodin v. Glass* (1895), 2 Ch. 316; *In re Jeffery* (1895), 2 Ch. 577; *In re Whitehead*, *Peacock v. Lucas* (1894), 1 Ch. 683; *In re Burton's Will*, *Banks v. Heaven* (1892), 2 Ch. 38; *Stevens v. Douglas*, 38 Atl. Rep. 730 (N. H.).

<sup>2</sup> See the authorities in note 2, page 266, above.

general rule is, that the gift will be construed to be vested and not to be contingent upon the event of attaining the given age. The courts here follow the principle involved in *Boraston's Case* above stated.<sup>1</sup> If the intermediate interest be given to another than the legatee "till" the legatee attains a given age, the legacy will be construed to be vested. This again is in conformity with the principle of *Boraston's Case*. The estate of the legatee is "in the nature of a remainder."<sup>2</sup>

We have stated above that when personalty and realty are limited together the courts have often applied the personalty rule of construction both to the realty and to the personalty.

<sup>1</sup> *Tudor's Lead. Cas.* (3d ed.) 848, 849; *Emerson v. Cutler*, 14 Pick. 108, 113; *Dale v. White*, 33 Conn. 294; *Hacker v. Gentry*, 3 Met. (Ky.) 471; *Felton v. Sawyer*, 41 N. H. 202; *Patterson v. Ellis*, 11 Wendell, 259; 1 *Jarman on Wills*, 843 *et seq.*; *Scotney v. Lower*, 31 Ch. Div. 386, 387; *In re Wrey*, 30 Ch. Div. 507; *Frost v. McCaulley*, 44 Atl. Rep. 779 (Del.); *Steinway v. Steinway*, 57 N. E. Rep. 312 (N. Y.).

There are qualifications of the foregoing principle as to the intermediate interest given to the legatee. A discretion in the trustees to apply less than the whole income will not vary the foregoing rule. But it has been held that a fixed sum for the maintenance of the legatee, although it be equal to the whole amount of interest, will not vest the legacy, and there are other exceptions. *Tudor's Lead. Cas.* (3d ed.) 849, 850; *Boughton v. James*, 1 Coll. 26; *Tracy v. Butcha*, 24 Beav. 438; *James v. Lord Wynford*, 1 Sm. & Giff. 59; *Bowditch v. Andrews*, 8 Allen, 339; *Emerson v. Cutler*, 14 Pick. 108; *Felton v. Sawyer*, 41 N. H. 202; *Edgerly v. Barker*, 31 Atl. Rep. 900 (N. H.); *In re Mervin*, *Mervin v. Crossman* (1891), 3 Ch. 197; 9 *Harv. Law Rev.* 244.

But in a late case (*In re Wintle* (1896), 2 Ch. 711) it was held that a discretion in the trustees, as above, will not bring the case within the rule, and that the legacy will be contingent although intermediate interests be given, the language being contingent language. *Webber v. Jones*, 47 Atl. Rep. 903 (Me.).

As to the mode of division of income being discretionary in the trustees under a given will, see *In re Coleman*, 39 Ch. Div. 443.

<sup>2</sup> *Lane v. Goudge*, 9 Ves. Jr. 225; 1 *Jarman on Wills*, 848; *Hanson v. Graham*, 6 Ves. Jr. 246, 247; 2 *Williams on Executors* (6th Am. ed.), 1241; *Hocker v. Gentry*, 3 Met. (Ky.) 463; *Johnson v. Baker*, 3 Murphy (N. C.), 318; *Penny v. Rhodes*, 2 Murphy (N. C.), 140; *Roberts v. Brinker*, 4 Dana, 570; *Chestnut v. Strong*, 1 Hill Ch. (S. C.) 123; *Gayther v. Taylor*, 3 Ired. Eq. 323; *De Vane v. Larkins*, 3 Jones Eq. 381; *Dusenberry v. Johnson*, 45 Atl. Rep. 103 (N. J. Ch.).

But there are cases in which the test applied has been, whether the limitation would be vested or whether contingent if it were real estate alone.<sup>1</sup> In dealing with real and personal property limited by will it often happens that real estate is treated as personalty, and it happens that personal property is sometimes treated as real estate. Thus, if the testator directs his real estate to be sold and converted into personalty, and limits the property to certain beneficiaries, the direction to convert the property works what is called an equitable conversion, and the subject-matter is treated as personal property; and a like equitable conversion is worked in the opposite direction when personal property is directed by the testator to be sold and the proceeds to be invested in real estate.<sup>2</sup>

<sup>1</sup> *James v. Lord Wynford*, 1 Sm. & Giff. 40, 59, 60; *Tapscott v. Newcombe*, 6 Jur. 755, 756; *Jull v. Jacobs*, 3 Ch. Div. 703.

<sup>2</sup> *In re Lowman*, *Deverish v. Pester* (1895), 2 Ch. 348; *In re Duke of Cleveland's Settled Estates* (1893), 3 Ch. 244; *In re Bird*, *Pitman v. Pitman* (1892), 1 Ch. 279; *In re Richerson*, *Scales v. Heyhoe* (1892), 1 Ch. 379; *In re Lewis*, *Foxwell v. Lewis*, 30 Ch. Div. 654; *Keith v. Nat. Tel. Co.* (1894), 2 Q. B. 150; *Atty. Gen. v. Marquis of Allesbury*, 16 Q. B. D. 408; *In re Smyth*, *Leach v. Leach* (1898), 1 Ch. 89; *In re Schmidt's Estate*, 37 Atl. Rep. 928 (Penn.); *In re Hubert's Estate*, 37 Atl. Rep. 577 (Penn.); *Putnam v. Story*, 132 Mass. 205; *R. I. Hosp. Trust Co. v. Harris*, 39 Atl. Rep. 750 (R. I.); *Appeal of Clarke*, 39 Atl. Rep. 155 (Conn.); *In re Holder*, 41 Atl. Rep. 576 (R. I.); *Greenwood v. Greenwood*, 53 N. E. Rep. 101 (Ill.); *Ebling v. Dreyer*, 44 N. E. Rep. 158 (N. Y.); *Salisbury v. Slade*, 54 N. E. Rep. 741 (N. Y.); *Johnson v. Conover*, 35 Atl. Rep. 291 (N. J. Ch.); *Taylor v. Haskell*, 35 Atl. Rep. 732 (Penn.); *Hazard v. Hazard*, 34 Atl. Rep. 150 (R. I.); *In re Soliday's Estate*, 34 Atl. Rep. 548 (Penn.); *Paisley v. Holzshu*, 34 Atl. Rep. 832 (Md.); *In re Ingersoll's Estate*, 31 Atl. Rep. 860 (Penn.); *Davenport v. Kirkland*, 40 N. E. Rep. 304 (Ill.); *Bolton v. Myers*, 40 N. E. Rep. 737 (N. Y.); *In re Traver*, 55 N. E. Rep. 406 (N. Y.); *In re Journey's Estate*, 44 Atl. Rep. 795 (Del.); *English v. Cooper*, 55 N. E. Rep. 687 (Ill.); *Wadsworth v. Murray*, 55 N. E. Rep. 910 (N. Y.); *In re Mustin's Estate*, 45 Atl. Rep. 313 (Penn.); *In re Searle*, *Searle v. Baker* (1900), 2 Ch. 829; *Trout v. Rominger*, 47 Atl. Rep. 860 (Penn.); *Chambers v. Sharp*, 48 Atl. Rep. 224 (N. J. Ch.); *Howell v. Mellon*, 42 Atl. Rep. 6 (Penn.); *Stoff v. McGinn*, 52 N. E. Rep. 1048 (Ill.); *In re Klotz's Estate*, 42 Atl. Rep. 477 (Penn.); *Duffield v. Pike*, 42 Atl. Rep. 641 (Conn.); *Sweeney v. Hone*, 42 Atl. Rep. 709, 712; *Van Zandt v. Garretson*, 43 Atl. Rep. 633 (R. I.); *Robison v. Botkin*, 54 N. E. Rep. 915 (Ill.); *Hackett v. Mosley*, 34 Atl. Rep. 949 (Vt.); *Reid v. Clenden-*

It is a rule of frequent application and very practical and convenient in limitations of personalty in wills subject to a life interest, that if it would be a vested remainder if the subject-matter were real estate, the interest shall be vested; but, if it would be a contingent remainder if the interest were real estate, the interest shall be contingent. Indeed, the principle is really broader, for many of the cases are cases of equitable interests, and the rule is, that were it real estate and to go over subject to a life interest, it would be vested, then the gift of the personalty shall be vested; and, if it would be contingent, then the gift of the personalty shall be contingent.<sup>1</sup> A very good case on this subject of which there are many is *McArthur v. Scott*.<sup>2</sup>

In such a case as *Bromfield v. Crowder*, above stated, which was the attainment of a given age case, we very much doubt whether the mere fact that one or more preceding life interests were limited would cause the court to treat the limitation to C as vested, if the subject-matter were personalty, for that was held to be a case of a vested remainder. In other words, we doubt whether the above personal-property rules of construction would be so strained as to make that a vested gift, simply because one or more life interests have been interposed which served as the particular estates in that case.<sup>3</sup>

ning, 44 Atl. Rep. 503; *Gross v. Sheeler*, 31 Atl. Rep. 812 (Del.); *In re Hurlbutt's Estate*, 40 N. E. Rep. 226 (N. Y.); *Lewis v. Shattuck*, 173 Mass. 486; *Hatt v. Rich*, 45 Atl. Rep. 971 (N. J. Ch.); *Nye v. Koehne*, 47 Atl. Rep. 215 (R. I.); *Moore v. Robbins*, 32 Atl. Rep. 379 (N. J.). Equitable conversion also arises upon a contract to sell land. *Williams v. Haddock*, 39 N. E. Rep. 826 (N. Y.).

<sup>1</sup> Gray on Perp. §§ 90, notes 1 and 3, 117 and note 2, 320; *McArthur v. Scott*, 113 U. S. 340, 380, 381; *Yeaton v. Roberts*, 28 N. H. 466, 467; 2 *Williams on Executors* (6th Am. ed.), 1239, 1243, note (m); *In re Bennett's Trusts*, 3 K. & J. 280; *Thod's Settlement*, 3 K. & J. 379; *Gibbens v. Gibbens*, 140 Mass. 102; *Lombard v. Willis*, 147 Mass. 13; *In re Wing's Estate*, 48 N. E. Rep. 539, 540; *Denny v. Kettell*, 135 Mass. 139.

<sup>2</sup> *McArthur v. Scott*, 113 U. S. 340.

<sup>3</sup> See the following authorities: *James v. Lord Wynford*, 1 Sm. & Giff. 40, 56; *In re Bennett's Trust*, 3 K. & J. 280; *Thod's Settlement*, 3 K. & J.

Still, the rule is as above stated concerning the interpretation of interests in realty and personalty having the form of the remainder expectant upon a life interest.

As to legacies charged upon land, the rule of construction is that in equivocal cases the courts will be more likely to treat the legacy as contingent than if it were not charged upon the land. But, if the devise be to A for life with a remainder over of the real estate and a legacy be charged upon the land after the expiration of A's estate, the courts will be more likely, in an equivocal case, to construe the legacy as vested than if there were no intermediate life estate to A, because, say the courts, the payment of the legacy, when it is charged upon the remainder, is postponed for the convenience of the life estate.<sup>1</sup> As to charging land with the payment of legacies, which is often done in wills, it is a fundamental rule that land is never to be charged with the payment of legacies, unless the whole will shows that it was the intention of the testator to make the land pay the legacies. Oftentimes there is a deficiency of the personal property for the payment of legacies, but even in that case, the land cannot be taken to help pay the legacies unless the whole will shows such to have been the intention.<sup>2</sup> Then, again, of course, there are

379; *Walker v. Mower*, 16 Beav. 365; *Nixon v. Robins*, 24 Ala. 670; *Snow v. Snow*, 49 Me. 159; 2 *Williams on Executors* (6th. Am. ed.), 1243; *Mair v. Quilter*, 2 Y. & C. 465; *Shum v. Hobbs*, 3 Drewry, 93; *Gardiner v. Slater*, 25 Beav. 509; *In re Wrangham's Trust*, 1 D. & Sm. 358; *Merry v. Hill*, 8 L. R. Eq. 619.

<sup>1</sup> 2 *Redfield on Wills* (3d ed.), 208; *Tudor's Lead. Cas.* (3d ed.) 856-860; *Yeaton v. Roberts*, 28 N. H. 466; *Harris v. Fly*, 7 Paige, 428; *Sweet v. Chase*, 2 N. Y. 73; *Birdsall v. Hewlett*, 1 Paige, 32; *Cook v. Hayward*, 172 Mass. 195.

<sup>2</sup> 2 *Redfield on Wills* (3d ed.), 208 *et seq.*; *In re Bawden* (1894), 1 Ch. 693; *In re Boards, Knight v. Knight* (1895), 1 Ch. 499; *Kilford v. Blaney*, 31 Ch. Div. 56; *In re Cevey*, 31 Ch. Div. 118; *Carter v. Gray*, 43 Atl. Rep. 711 (N. J. Ch.); *Johnson v. Conover*, 35 Atl. Rep. 291, (N. J. Ch.); *Meis v. Meis*, 35 Atl. Rep. 370 (N. J. Ch.); *In re Watts' Estate*, 32 Atl. Rep. 42 (Penn.); *Pearson v. Wartman*, 31 Atl. Rep. 446 (Md.); *Hoyt v. Hoyt*, 45 Atl. Rep. 138 (N. H.); *In re Hammond's Estate*, 46 Atl. Rep. 935 (Penn.); *Dunham v. Deraismes*, 58 N. E. Rep.

cases, such as we first referred to, in which the legacies are distinctly charged upon the land. Another great practical principle is that in case of intestacy the debts of the intestate are first to be paid out of his personal property,<sup>1</sup> and the same rule will apply in case the deceased person has died testate, unless his will shows a different intention.

The next point is expressed by the leading case of *Doe v. Moore*.<sup>2</sup> It was a devise of real estate to A when he attains the age of twenty-one years, and, in case he die without attaining that age then to go over. Now, when the testator died A had not reached the age of twenty-one, and the question was whether the devise was contingent upon his attaining that age. The court held that it was not contingent, but was a vested gift and that he was entitled immediately to the possession of the land. Of course, it was defeasible. Now, said the court, if this had been personalty the construction would have been otherwise, and this last point is made very plain when we come to apply the above rules of construction. Indeed, though real estate, yet Mr. Fearne in his *Posthumous Works*<sup>3</sup> shows that the vested construction depended largely, if not entirely, upon there being a limitation over. It is exactly the same principle which appears in *Bromfield v. Crowder*, above, although that was a case of a remainder, but the principle is the same. Now, suppose that the court had

789 (N. Y.); *Stewart v. Stewart*, 47 Atl. Rep. 637 (N. J. Ch.); *In re Walter's Estate*, 47 Atl. Rep. 862 (Penn.); *Budd v. Wilson*, 48 Atl. Rep. 226 (N. J. Ch.); *Stickel v. Crane*, 59 N. E. Rep. 597 (Ill.); *Parsons v. Miller*, 59 N.E. Rep. 606 (Ill.).

<sup>1</sup> 3 Shars. & Budd, 459; *In re Head's Trustees and MacDonald*, 45 Ch. Div. 312, 314, 315; *In re Harrison*, 43 Ch. Div. 55, 59; *In re Bate*, 43 Ch. Div. 600; *Kilford v. Blaney*, 31 Ch. Div. 56; *Trott v. Buchanan*, 28 Ch. Div. 446; *Suydan v. Voorhees*, 43 Atl. Rep. 4 (N. J. Ch.); *Morris v. Higbee*, 32 Atl. Rep. 372 (N. J.).

<sup>2</sup> *Doe v. Moore*, 14 East, 601. And see *Doe v. Nowell*, 1 M. & S. 334; *Tudor's Lead. Cas.* (3d ed.) 836, 838; 1 *Jarman on Wills*, 810; *Raney v. Heath*, 2 Patten & Heath (Va.), 206.

<sup>3</sup> *Fearne's Posthumous Works*, 191. And see *Tudor's Lead. Cas.* (3d ed.) 836.

held that A was not entitled to the immediate possession, but that he must wait until he attain the age of twenty-one, if ever. This would, in such case have been an executory devise of the second class.

We understand it to be the general rule of law that if there be a trust of real or personal property or both, and vested language be used and the time of payment or distribution be postponed until the beneficiary shall reach an age exceeding twenty-one, and there be no valid limitation over, the beneficiary is entitled to demand of the trustees the transfer of the property upon his attaining twenty-one years of age, at which time he can give the trustees a valid discharge; but if there be a valid limitation over, for example, to go over if he die under twenty-three, then, of course, the trustees must keep the property to see whether it shall go over or not.<sup>1</sup>

The above doctrine, that the beneficiary may claim the property on attaining his majority, has been repudiated in Massachusetts in *Clafin v. Clafin*,<sup>2</sup> in which the court takes the ground that the directions of the testator must be followed, if they be not repugnant to the rules of law, and bases this proposition upon the rule laid down in *Broadway Bank v. Adams*.<sup>3</sup> Since *Clafin v. Clafin* was decided, the Massachusetts court has applied the same doctrine in several

<sup>1</sup> *In re Johnston*, *Mills v. Johnston* (1894), 3 Ch. 204; *Wharton v. Masterman* (1895), App. Cas. 186; *Gray on Perp.* §§ 119-121, 638, 639 and notes, 640, 641, 672; *Tudor's Lead. Cas.* (3d ed.) 975; *Tatham v. Vernon*, 29 Beav. 617; *Hughes v. Edwards* (1892), App. Cas. 583, 590. This principle applies also when the provision is not the attainment of a given age, but is the legatee's marriage. The beneficiary is entitled to receive the property on attaining the age of twenty-one, whether married or not. *In re Wrey*, 30 Ch. Div. 507.

<sup>2</sup> *Clafin v. Clafin*, 149 Mass. 19.

<sup>3</sup> *Broadway Bank v. Adams*, 133 Mass. 170. If there be an equitable life estate with a limitation over of the capital and the trustees are given discretion as to how much income to pay from time to time, this is a gift of the entire income to the beneficiary for life and he or she may alienate it. *Endicott v. Univ. of Va.*, 182 Mass. 156.



cases, in which the event was not the attainment of a given age, but was some other event.<sup>1</sup>

*Broadway Bank v. Adams*<sup>2</sup> was on a totally different state of facts from those of *Clafin v. Clafin*, but the court declares that a testator may do anything by his will which is not repugnant to the rules of law. It was held that a testator had a right to protect the income of an equitable tenant for life from the claims of his creditors, and from the beneficiary's anticipating the income by an assignment of it; that is, to render void any such assignment by him, without the testator's providing for any termination of his estate in the event of such assignment, or in the event of his insolvency. In this case it was declared that the income cannot be taken by a creditor until actually paid to the beneficiary.<sup>3</sup> Later cases have held that his interest will not pass to an assignee in bankruptcy or insolvency, should he go into bankruptcy or insolvency. In other words, the assignment to the assignee in bankruptcy or insolvency does not transfer his interest.<sup>4</sup> Of course, as shown above, a provision in general restraint of alienation of a fee simple or of a transmissible interest in personalty is void. This is very elementary.

It was held in *Crawford v. Langmaid*<sup>5</sup> that a man cannot make a deed creating a trust giving himself an equitable life estate and protecting it from his creditors so as to defeat them; but that if he make a limitation over in such case to his own heirs at law, provided there be no intention to defraud his creditors, the limitation over to the heirs at law is good, so

<sup>1</sup> *Young v. Snow*, 167 Mass. 287; *Brown v. Wright*, 168 Mass. 506, 510; *Donahy v. Noonan*, 176 Mass. 467.

<sup>2</sup> *Broadway Bank v. Adams*, 133 Mass. 170.

<sup>3</sup> See *Hood Bars v. Heriot* (1896), App. Cas. 174; *In re Sampson* (1896), 1 Ch. 630; *Whiteley v. Edwards* (1896), 2 Q. B. 48.

<sup>4</sup> *Billings v. Marsh*, 153 Mass. 311; *Munroe v. Dewey*, 176 Mass. 184.

<sup>5</sup> *Crawford v. Langmaid*, 171 Mass. 309.

An active trust for the benefit of "A and his family" leaves the interest of A exempt from his debts, as the court will not sever his interests from that of his family. *St. John v. Dann*, 34 Atl. Rep. 110 (Conn.).

that the creditors cannot take the principal of the estate. Now, here is a case in which the conveyance to the grantor's own heirs is upheld, so that they take as purchasers ; but, as shown in the previous chapter, ordinarily the same rule applies in deeds which applies in wills, namely, that the gift to the testator's or grantor's heirs is void.

## CHAPTER XXII.

## THE REVERSION AND POSSIBILITY OF REVERTER IN CONNECTION WITH THE CONTINGENT REMAINDER IN FEE.

IN an early chapter we distinguished between the reversion and the possibility of reverter, and there said that the distinction there laid down would have to be qualified or added to at some time after we had considered the contingent remainder in fee. It is perfectly settled that if a contingent remainder in fee be created by way of use or by way of devise, there remains a reversion and not a possibility of reverter. It is an open question whether it be a reversion or a possibility of reverter if the contingent remainder in fee be created by a common-law conveyance, for example, by feoffment, fine, or common recovery. We think the weight of authority and the force of reason favor the view that the interest in this case as well, is a reversion.<sup>1</sup> If it be a possibility of reverter, then the inheritance, to use the language of the books, is *in gremio legis*, *in nubibus*, that is, in the lap of the law, in the clouds, which certainly makes it to be everywhere and nowhere. To use the other expression of the books, which means the same as the above, the inheritance is in abeyance.<sup>2</sup>

Now, those who argue for the position that the inheritance is in abeyance, seek to explain the truth that it is not in abeyance in the case of uses and devises, but that there is a reversion in those cases, by the equitable nature which uses

<sup>1</sup> Gray on Perp. §§ 11 and note 2, 113 a ; 2 Wash. R. P. 263 ; Co. Litt. (notes by Thomas, etc.) vol. 3, p. 103, note (g) ; Shapleigh v. Pilsbury, 1 Greenleaf (Me.), 271, 280.

<sup>2</sup> 2 Preston's Abstr. 101 *et seq.* ; Cornish on Rems. 174 *et seq.*

had before and retained after the Statute of Uses.<sup>1</sup> This refers to the resulting use. If, before the Statute of Uses, a common-law conveyance, for example, a feoffment, were made to A and his heirs, this passed the legal title to the feoffee, and equally so, although there was no consideration for the conveyance and no declaration of a use in favor of the feoffee; but in such a case equity raised a resulting use in the feoffor so that the feoffee had nothing but a barren legal title, and the real, valuable ownership remained in the feoffor, the court of equity holding the feoffee to be a trustee for the feoffor.<sup>2</sup> Now, these authors do not, of course, claim that the interest of the grantor in a deed to uses, or of the heir of a devisor, is an equitable interest; but they claim that the reason why it is a reversion, which is a valuable vested estate, and not a mere possibility of reverter, is really based upon the same principle as the equitable character of a resulting use. We do not agree to this explanation, but, as above, favor the view that the interest of a feoffor, in a common-law conveyance creating a contingent remainder in fee, is a reversion, just as much as the interest is a reversion when the instrument is a limitation to uses or a will of land.

There are two objections to the possibility of reverter theory, — one practical, the other technical. Very early in this book it appeared that if a tenant for life made a feoffment, levied a fine, or suffered a common recovery, thus creating a fee tortiously, it operated as a disseisin of the reversioner or vested remainderman, and that he was immediately entitled to enter. But suppose that a contingent remainder in fee be limited expectant upon the life estate, and that the grantor have therefore only a possibility of reverter. By the better opinion he could not enter, and this certainly would place the estate mercilessly in the hands of the life tenant. The other objection is technical. It is that it would produce an abeyance, even an abeyance of the inheritance, and this the com-

<sup>1</sup> Cornish on Uses, 77.

<sup>2</sup> Williams, R. P. 156.

mon law abhorred, and would never permit unless it were necessary and indispensable.<sup>1</sup> The common law sometimes could not avoid an abeyance. A good illustration of that is the case of a conveyance to a parson and his successors. It is unsettled whether the inheritance be in abeyance, in which case he takes only a life estate.<sup>2</sup> But if he takes the inheritance, that has to be in abeyance upon his death until his successor is appointed, and if he takes only a life estate, both the inheritance and the life estate are in abeyance upon his death, until his successor is appointed.<sup>3</sup>

<sup>1</sup> Fearne on Rems. 360, 361.

<sup>2</sup> Litt. §§ 645, 646; Co. Litt. 44 a, 342 b; *Town of Pawlet v. Clark*, 9 Cranch, 329; 2 Black. Com. (Shars. ed.) 107, notes; 16 Law Quart. Rev. 335; 1 Kerr, R. P. §§ 31, 260.

<sup>3</sup> 2 Black. Com. (Shars. ed.) 107; 1 Kerr, R. P. § 260; 16 Law Quart. Rev. 335.

## CHAPTER XXIII.

## THE RULE AGAINST PERPETUITIES.

THE rule against perpetuities, briefly stated, is that any interest is void as too remote which by any possibility may not become vested in interest or in possession within the perpetuity period. The perpetuity period is measured by lives in being at the death of the testator, or at the time of the execution and delivery of the deed, and twenty-one years and one or more periods of gestation added. When lives cannot be taken as the measure, the perpetuity period is twenty-one years.<sup>1</sup> As a tenant in tail has control, no limitation over subject to an estate tail can be void as too remote. We are here assuming that the interest must take effect, if ever, not later than the expiration of the estate tail.<sup>2</sup> In some of the states there are statutes which establish a rule against perpetuities,<sup>3</sup> but the rule against perpetuities which we are here considering is the common-law rule which obtains in Massachusetts, in most of the states, and in England. A testator's own children never can be within the rule against perpetuities, because they are necessarily lives in being at his death, but a testator's grandchildren or the children of any third person may be within the rule.

There is a late case in Illinois in which the principle of the rule against perpetuities was misconceived. It is the case of

<sup>1</sup> Lewis on Perp. 172; Marsden on Perp. 34; Kimball v. Crocker, 53 Me. 272; Rolfe v. Lefebvre, 45 Atl. Rep. 1087 (N. H.).

<sup>2</sup> 2 Wash. R. P. 297; Gray on Perp. §§ 443 *et seq.*, 449, 450; Van Grutten v. Foxwell (1897), App. Cas. 664, 665, 679, 688.

<sup>3</sup> Chaplin on the Suspension of the Power of Alienation, and see the Preface of that book; 1 English Ruling Cases (Am. notes), 519.

*Eldred v. Meek*.<sup>1</sup> It was a devise to the testator's grandchildren, naming them, to take at the age of twenty-five. It was held to be void as too remote. Now, even conceding that it would be contingent in them upon their attaining the age of twenty-five, it could not be void as too remote, because they were lives in being at the testator's death. It was not a case of a devise to grandchildren so as to include any after-born members, but it was a devise to specified individuals, and it certainly cannot damage the gift that they happened to be the testator's grandchildren. The principle here applicable must not be confounded with that other principle, above mentioned, that when lives cannot be taken as the measure the period is twenty-one years. Thus, take a devise to A and his heirs from and after twenty-five years. Here lives cannot be taken as the measure. But it is not necessary that A should be alive at the end of that period, and, as it cannot vest in interest or possession until the expiration of that period, it is void as too remote. But in the case of the devise to the testator's grandchildren, above mentioned, it is necessary, in order that they should take a gift which is contingent in them upon their attaining the age of twenty-five, that they should live to attain that age in order to take.

It is settled law, as we understand, that if there be a gift of a moneyed fund in trust for A for life, and then for such of his children as shall reach the age of twenty-five, the gift to the children is void as too remote. But if A die before the testator, so that his interest lapses, the gift to the children is good, because they are necessarily lives in being at the testator's death.<sup>2</sup>

<sup>1</sup> *Eldred v. Meek*, 55 N. E. Rep. 536 (Ill.).

For a list of late cases, in which the principle of the rule against perpetuities was correctly applied, see *Weinbrenner's Estate*, 34 Atl. Rep. 215 (Penn.); *Chwatal v. Chreiner*, 43 N. E. Rep. 166, 168 (N. Y.); *Davenport v. Kirkland*, 40 N. E. Rep. 304 (Ill.); *In re Gerber's Estate*, 46 Atl. Rep. 497 (Penn.).

<sup>2</sup> 1 *Jarman on Wills* (5th ed. by Bigelow), 254.

If there be a gift to such of the children of A as shall attain the age of twenty-five, and if none of them attain that age then over, this is all void as too remote. The language is strongly contingent language and the gift to the children is evidently too remote, and the gift over is evidently too remote; but were it to read that it was likewise to go over if A should die without children, this limitation over would be good.<sup>1</sup> In *Evers v. Challis*,<sup>2</sup> stated in a previous chapter, we had an illustration of the implied split limitation. Here we have an illustration of the express split limitation, and we would have to wait until the death of A to find out whether the gift over would be good upon the contingency of A dying without children. Certainly it could not be too remote, because it must be discovered at the end of a life in being whether it was going to take effect or not. But we never have to wait to find out whether an interest is too remote under the rule against perpetuities, because we answer that question from an inspection of the deed or will. In other words, if by any possibility it can vest in interest at too late a time, it is void.

If there be an interest limited by will for life or other limited period with a limitation over void as too remote, or void for any reason, as by lapsing, we will now consider what becomes of the property which has not thus been bequeathed or devised, and after that we will consider what becomes of the property which has not thus been bequeathed or devised, when the first gift be not for life or other limited period, but be in fee, if realty, or a transmissible interest, if personalty. First, as to personalty. If there be no residuary bequest it passes to the persons entitled under the statute of distributions; but if there be a residuary bequest it passes to the residuary legatees. The technical legal title to personalty,

<sup>1</sup> Gray on Perp. §§ 184, 331 *et seq.*; 1 Jarman on Wills (5th ed. by Bigelow), 285-288; *Perkins v. Fisher*, 59 Fed. Rep. 801; *In re Bence* (1891), 3 Ch. 242.

<sup>2</sup> *Evers v. Challis*, 7 H. of L. Cas. 531.



however, is in the executor from the time of the testator's death, and in case of intestacy the technical legal title to personalty is in abeyance until an administrator is appointed, and then it vests in him relating back to the time of the death of the intestate.<sup>1</sup> There never was a time when the residuary clause in a will would not pass the personal property which a testator should own at the time of his death. But the rule is otherwise in real estate. Suppose, then, as above, that there be a devise of real estate for life or other limited period, and that the devise over be, for any reason, void, for example, void for remoteness, or void because it has lapsed, that is, that the devisee has died before the testator; the fee being undevised, that is, ineffectually devised, will pass to the testator's heir at law, as a matter of course.<sup>2</sup> But suppose that

<sup>1</sup> 1 Williams on Executors (6th Am. ed.), 695-702; Pritchard v. Norwood, 155 Mass. 541, 542.

<sup>2</sup> We have above supposed the case of a limitation over lapsing. Let us now suppose that there be a fee in real estate or a transmissible interest in personalty with a limitation over, and that the first taker die before the testator so that his interest lapses, or that the object of the gift first limited does not come into existence. The general rule is, but it is only the general rule, that the limitation over is not defeated by the failure of the first gift. The question is always one of construction of the particular will. Tudor's Lead. Cas. (3d ed.) 477, 870-872, 875, 916; Robison v. Female Orphan Asylum, 123 U. S. 702; Pennington v. Pennington, 70 Md. 418; *In re Lowman*, Deverish v. Pester (1895), 2 Ch. 348; *In re Pinhorne*, Moreton v. Hughes (1894), 2 Ch. 276; *In re Treadwell*, Jeffray v. Treadwell (1891), 2 Ch. 654; *In re Miller's Will*, 55 N. E. Rep. 385 (N. Y.); *In re White's Estate*, 34 Atl. Rep. 321 (Penn.). But see *In re Gerber's Estate*, 46 Atl. Rep. 497 (Penn.).

If there be a gift to A, and if he die under twenty-one years of age then over, the gift over will take effect should A die under twenty-one years of age before the testator. But if the gift be to A, and if he die under twenty-one years of age then over, and he die before the testator, having attained the age of twenty-one, the gift over will fail. Tudor's Lead. Cas. (3d ed.) 873, 874, 915.

If there be a gift to A and his children, if he should have any, and if he die childless, then over, and A die before the testator leaving a child, the gift over will fail, even though that child die before the testator. McGreery v. McGrath, 152 Mass. 24.

If there be a gift to A and B, and one of them die before the testator,

there be a residuary clause in the will. This will make no difference unless the matter is helped by statute. The reason assigned for this is the rule of law that a will passes only the real estate which the testator owns at the time of making his will. It is as if he had by his will given it away, so that he did not own it; that is, since a testator cannot, by his will, pass after-acquired real estate, this is treated as if it were after-acquired real estate.

Now, modern statutes have very generally changed this rule, so that under modern statutes a residuary devise will generally pass void and lapsed devises.<sup>1</sup>

Another reason given for the rule that a residuary devise will not pass void devises of real estate is the disinclination of the courts to disinherit the testator's heir at law, or, as it his share does not enure to the benefit of the other; and this is equally true even though the subject-matter be a residue. But if there be a gift of a residue to a class, and a member of the class die before the testator, the class will be ascertained as of the time of the testator's death. *Horton v. Earle*, 162 Mass. 448, 450; *Workman v. Workman*, 2 Allen, 472; 1 *Dembitz on Land Titles*, 672; *Swallow v. Swallow*, 166 Mass. 241, 243; *Frost v. Curtis*, 167 Mass. 251; *Powers v. Codwise*, 172 Mass. 425; *In re Gorga's Estate*, 31 Atl. Rep. 86 (Penn.); *Lyman v. Coolidge*, 176 Mass. 7; *Gordon v. Jackson*, 43 Atl. Rep. '98 (N. J. Ch.); *Brewster v. Mack*, 44 Atl. Rep. 811 (N. H.); *In re Kimberly's Estate*, 44 N. E. Rep. 945 (N. Y.); *Rockwell v. Bradshaw*, 34 Atl. Rep. 758 (Conn.); *Kingsbury v. Walter* (1899), 2 Ch. 314; affirmed on appeal (1901), App. Cas. 187; *Stanwood v. Stanwood*, 179 Mass. 223.

But under the Massachusetts statutes even in the case of a gift to a class, the gift will not lapse by death before the testator, provided that the gift be to a child or other relation of the testator, and that the party deceasing leave issue which survives the testator. Revised Laws of Mass. ch. 135, § 21; *Moore v. Weaver*, 16 Gray, 305; *Stockbridge, Petr.*, 145 Mass. 517, 520. In *Bullard v. Shirley*, 153 Mass. 559, the first limitation was void, but the limitation over was sustained as not conditioned upon the prior gift.

<sup>1</sup> Gray on Perp. §§ 248 and note 2, 533; *Hawkins on Wills* (2d Am. ed.), 44, 45 and notes; *Hall v. Hall*, 123 Mass. 120; *Thayer v. Wellington*, 9 Allen, 283; *Carter v. Church*, 39 N. E. Rep. 628 (N. Y.); 2 *Jarman on Wills*, 836; *Chaplin on Wills*, 451, 452; *St. Paul's Church v. Atty. Gen.*, 164 Mass. 201; *English v. Cooper*, 55 N. E. Rep. 687 (Ill.); *Davis v. Davis*, 57 N. E. Rep. 319 (Ohio); *Dexter v. Harvard College*, 176 Mass. 196.

is often expressed, the disposition of the courts to favor the testator's heir at law.<sup>1</sup>

Modern statutes have to a great extent changed the rule as to a devise of real estate not passing after-acquired real estate. But in some states the statutes require that the will must show an intention to pass after-acquired real estate. Otherwise, the will will only pass the real estate which the testator owned when he made his will.<sup>2</sup>

There are two theories by which to account for the principle that a devise of real estate did not pass land not owned by the testator at the time he made his will. One of these is that of Professor Hammond.<sup>3</sup> We recently pointed out how that primogeniture became established in England during the twelfth century, and that, as it never was applied to personality, the jurisdiction over the succession to personality fell into the hands of the ecclesiastical courts. Now, Professor Hammond thinks that after the Statute of Wills in the reign of Henry VIII. the courts were afraid that jurisdiction over devises of real estate might slip into the hands of the ecclesiastical courts, and, therefore, that they likened devises of real estate to conveyances of real estate. Now, a conveyance of real estate purports to pass some definite piece of real estate, and not something the grantor may later acquire.

Pollock and Maitland have a different theory for the rule of law that a will does not pass after-acquired land. Among the ancient Saxons in England certain interests in land, known as boc-land, were devisable, and the custom of devising lands persisted after the Norman Conquest.<sup>4</sup> The courts,

<sup>1</sup> Thayer *v.* Wellington, 9 Allen, 296.

<sup>2</sup> *In re Bridges*, Brompton Hosp. *v.* Lewis (1894), 1 Ch. 297; *In re Champion* (1893), 1 Ch. 101, 115; *Patrick v. Simpson*, 24 Q. B. D. 128; 1 Dembitz on Land Titles, § 90; *In re Pierce*, 39 Atl. Rep. 430 (R. I.); *Webster v. Wiggin*, 31 Atl. Rep. 825 (R. I.); *Rockle v. Graffin*, 39 Atl. Rep. 624 (Md.); *Wooster v. Cooper*, 45 Atl. Rep. 389 (N. J. Ch.); *In re Hawes*, 47 Atl. Rep. 705 (R. I.).

<sup>3</sup> 2 Black. Com. (Hammond's ed.) 583.

<sup>4</sup> 2 Pollock & Maitland, 313, 321-327.

very early after the Norman Conquest, came to hold interests in land to be undevisable, and this, probably for the reason that land was too valuable to be given away hastily by what would often be a death-bed testament,<sup>1</sup> so that everywhere the books lay it down that at common law lands are undevisable. The ancient will was frequently a conveyance, the testator reserving a life estate to himself.<sup>2</sup> It will be remembered that one of the purposes for the introduction, or, at least, for the prevalence, of uses, was to enable people to will their real estate; for they could make a will of the use in the land, and it will also be remembered that the form of devising a use was frequently as follows: the landowner would make a feoffment, he, of course, retaining the use and occupancy of the land, and the feoffees to make such conveyance at his death as he should by his last will direct. There is certainly a striking resemblance between the ancient will of the legal interest in land and the devise of a use in land. The custom of devising lands, that is, the legal interest, persisted in certain localities in England, that is, the old Saxon custom did not die out, and in those localities wills were not ambulatory, that is, they did not pass after-acquired land. Now, Pollock and Maitland are of the opinion that after the Statute of Wills in the reign of Henry VIII. the judges derived their rule that wills of land should not be ambulatory from the custom found to prevail in these localities.<sup>3</sup>

In proposing the question as to what becomes of the property in case the limitation over be void as too remote, we will now consider that question with reference to the second branch, in which we assume that the first taker has a fee, or, if the subject-matter be personalty, a transmissible interest. Here we must distinguish between words of condition and words of limitation. If the gift over in the will be made to

<sup>1</sup> 2 Pollock & Maitland, 326.

<sup>2</sup> 2 Pollock & Maitland, 315 *et seq.*

<sup>3</sup> 2 Pollock & Maitland, 313 *et seq.*

go over by words of condition and the limitation over be void as too remote, the first taker of real estate has a fee simple absolute. He is given by the will a determinable fee, but, the limitation over being void, he gets a fee simple absolute. A very good illustration of this is the case of *Brattle Square Church v. Grant*.<sup>1</sup> The same rule applies in the case of personalty if the first taker be given a transmissible interest.<sup>2</sup>

But, suppose that the words be not words of condition but be words of special or collateral limitation. A very good illustration of the rule in this case is afforded by the case of *First Universalist Society of North Adams v. Boland*,<sup>3</sup> in which there was a deed of land in fee so long as the grantees should conform to certain tenets of the Christian religion, and when they should cease so to conform, the estate to go over. The limitation over was obviously void as too remote; but the court held that the possibility of reverter was not subject to the rule against perpetuities, and thus, that for the purpose of the rule against perpetuities a possibility of reverter is a vested interest. Of course, the very contingency upon which the estate was limited to go over is precisely the same as that upon which the possibility of reverter may take effect.<sup>4</sup> The court further said, applying a very elementary rule, that upon the occurrence of the contingent event, should it in the future occur, the grantor or his heirs would be in without the necessity of an entry. In an early chapter we saw that to entitle a grantor upon breach of a condition subsequent, he must make an entry, but that the title in the grantor is perfect without an entry when the estate has ex-

<sup>1</sup> *Brattle Square Church v. Grant*, 3 Gray, 156. See also *Howe v. Hodge*, 152 Ill. 252; *Madison v. Larmon*, 28 Chicago Legal News, 231; Gray on Perp. § 247.

<sup>2</sup> *In re Hancock* (1901), 1 Ch. 482 (Ct. of App.).

<sup>3</sup> *First Universalist Society of North Adams v. Boland*, 155 Mass. 171.

<sup>4</sup> See also *Lloyd Phillips v. Davis* (1893), 2 Ch. 491, 495, 496. See further, *In re Randell*, 38 Ch. Div. 213.

pired by limitation. Words of limitation mark the bounds of the estate, and when the estate has expired by having reached its bounds, whether it be for years, for life, in tail, or in fee, it is completely at an end. In the above case the grantees brought a bill in equity to compel the defendant to take a deed of the land, in other words, to compel the specific performance of his contract to buy the land. The decision was that the plaintiffs had not a fee simple absolute, for the reason above given, and therefore could not require the defendant to accept the conveyance.

It has been said in the books many times that there cannot be a possibility upon a possibility. But there is no such rule of law. If there be any rule on the subject it is limited in its application to two forms of limitation, which we will soon discuss.

In *Routledge v. Dorril*<sup>1</sup> there were four possibilities upon possibilities. The case has been often cited and commented on, and it has never been disputed that the limitations were all good. In that case there was a conveyance by deed to trustees of a moneyed fund for the benefit of a man and woman, just before their intended marriage, for their lives, with a power of appointment given them among the issue of the marriage, and, in default of appointment, to the children or other issue of the marriage who should be living at the death of the survivor of this pair. The sons were to take at the age of twenty-one, and the daughters at twenty-one or marriage. Here, in order for a grandchild to take, there are four possibilities upon possibilities: first, that there would be a child of the marriage; secondly, that there would be issue of that child or children; thirdly, that a grandchild should be living at the death of the survivor of the pair; fourthly, that any male should attain the age of twenty-one, or any female attain that age or marry.

<sup>1</sup> *Routledge v. Dorril*, 2 Ves. Jr. 357; discussed in Butler's notes to Fearn on Rems. 251, note.

In *Whitby v. Mitchell*<sup>1</sup> there was a limitation of land in trust for A, a person *in esse*, for his life, and then to his unborn child for life, and then to the children of the unborn child who should be born during the life of A. This ultimate remainder was held void as a possibility upon a possibility. It could not offend the rule against perpetuities, because it was limited to such children as should be born during the life of A. In *In re Frost*,<sup>2</sup> Kay, J., whose decision in *Whitby v. Mitchell* was affirmed on appeal, held the remainder to be bad because of the rule against perpetuities. In that case it was not protected from the rule against perpetuities, as was the ultimate remainder in *Whitby v. Mitchell*. He could, however, in *In re Frost*, have pronounced it bad as a possibility upon a possibility. *Whitby v. Mitchell* has been condemned by eminent writers.<sup>3</sup> Now, this particular form of a possibility upon a possibility, these two English cases show, covers, likewise, the case of a limitation to a possibly unborn person with a limitation over to that person's issue; thus, to a woman and her husband and then over to the issue of the marriage, because, perchance, the husband she may marry may be not yet born.

The above are the two forms of bad possibilities upon possibilities; but there is no rule of law that there cannot be a possibility upon a possibility, even if it be the law that there cannot be in respect to those two forms.

*McArthur v. Scott*<sup>4</sup> is most elaborately considered and there were several possibilities upon possibilities, but it was not even suggested that there was any trouble on that account. The limitations were all held valid, but the forms were not either of the two above mentioned. We trust that the

<sup>1</sup> *Whitby v. Mitchell*, 42 Ch. Div. 494; affirmed on appeal, 44 Ch. Div. 85.

<sup>2</sup> *In re Frost*, 43 Ch. Div. 246.

<sup>3</sup> 6 Law Quart. Rev. 410; 14 Law Quart. Rev. 234.

<sup>4</sup> *McArthur v. Scott*, 113 U. S. 340. See further, *Fales v. Fales*, 148 Mass. 47.

American courts will not follow this doctrine of *Whitby v. Mitchell*.<sup>1</sup>

It has recently been decided in *In re Bowles, Amedroz v. Bowles*<sup>2</sup> that the doctrine of *Whitby v. Mitchell* does not apply to personal property.

If there be a contingent remainder, thus, to A for life and after his death to such of his children as shall attain the age of twenty-five, this remainder is not too remote. It is good, because it must fail unless it shall take effect at the death of A. But if the limitation be not a legal limitation of real estate, the gift to the children is void as too remote, because it may vest at too remote a time, that is, more than twenty-one years and nine months after the death of A, who is supposed to be a life in being at the testator's death.<sup>3</sup>

It is an open question whether the rule against perpetuities applies to a contingent remainder expectant upon a life estate, if the contingent remainder be not protected by statute from destruction, and yet be required to arise immediately upon the expiration of some particular estate. We have in a previous chapter alluded to two classes of legislation, one of which classes protects the contingent remainder from destruction, the other of which classes enables the contingent remainder to take effect after the expiration of the particular estate. The argument in favor of the view that the contingent remainder expectant upon a life estate is not subject to the rule against perpetuities when not affected by statute, is, that it is

<sup>1</sup> Mr. T. Cyprian Williams takes the ground, in 14 *Law Quarterly Review*, 234, that this doctrine arose from a blunder of a Mr. Booth, a conveyancer, about the middle of the eighteenth century; while Mr. Sweet, in 15 *Law Quarterly Review*, 71, pronounces the rule to be an ancient one. The Court of Appeal in *Whitby v. Mitchell* speak of it as a feudal rule; but it certainly is not feudal, and we must suppose that by feudal, the court did not mean that it is connected with the feudal system, but merely that it is ancient.

<sup>2</sup> *In re Bowles, Amedroz v. Bowles* (1902), 2 Ch. 650.

<sup>3</sup> *Gray on Perp.* §§ 319-321, 325, 326, 339-368; *Symes v. Symes* (1896), 1 Ch. 272.



always under the control of some tenant for life, and we have seen above that the reason why contingent remainders and other limitations over subject to an estate tail are not amenable to the rule against perpetuities, is that the tenant in tail always has control. There are only two cases independently of statute in which this question can arise. One of these is to A for life, remainder to his unborn child for life, remainder to the children of the unborn child. This ultimate remainder may be postponed as to vesting in interest until more than twenty-one years and nine months after the death of A, because it has the intermediate particular estate of the unborn child to support it, and, if the rule against perpetuities can apply, it may vest at too remote a time. The other case is to A for life, remainder to his unborn children for their lives, remainder to the survivor in fee.

*Sears v. Putnam*<sup>1</sup> was a case of a devise of property in trust to the testator's nieces, the trust to endure for twenty-five years. At the end of twenty-five years the capital was to be paid to the nieces, and, in case of the death of any niece to her children, and in case of the death of a niece without children or upon the extinction of her line, her share to be paid to the other nieces, or, in case of their death, to their children. These limitations over were executory devises, the trust terminating at the end of twenty-five years. These executory devises were all void as too remote, and it was held that the executory devises being void, the nieces took absolute indefeasible shares. This case may be looked at in

<sup>1</sup> *Sears v. Putnam*, 102 Mass. 5. See further, *In re Johnston's Estate*, 39 Atl. Rep. 879 (Penn.). In *Ingraham v. Ingraham*, 48 N. E. Rep. 572 (Ill.), the children of nephews and nieces were held to be confined to children living at the testator's death so as not to include the after-born.

As to the rule against perpetuities the court has sometimes distinguished the gift of the income from the gift of the capital, and while holding the gift of the capital to be too remote, has sustained the gift of the income. *In re Watson* (1892), *Weekly Notes*, 192; *In re Wise* (1896), 1 Ch. 281.

two ways. First, it is plain that the executory devises could not vest for twenty-five years, and that that time might be more than twenty-one years and nine months after the deaths of all the nieces who were lives in being at the testator's death. Another way of looking at the case is this; from reading the provisions of the will it would seem to have been the scheme of the testator that the shares of the nieces might shift around, passing upon the death of any niece to her children, and, in default of children or upon the extinction of that line, over to other nieces, and, in case of their decease, to their children, the children in either case taking the parents' share. Looking at the case from this point of view it was possible that all the nieces might die eleven or twelve months after the testator, some or all of them leaving children who were not conceived at the testator's death, and that the property might shift from one to another of these more than twenty-one years and nine months after the deaths of all the nieces.

When gifts are independent or separable, then the fact that the limitations over of some of them are void as too remote, does not vitiate the other limitations over. In *Sears v. Putnam*, above, the gifts were not independent or separable, the share of one niece might ultimately vest in another niece or in her children; but when the gifts are independent or separable the lines do not cross. In *Hills v. Simonds*,<sup>1</sup> which was a case of independent or separable gifts, the will created a trust for the life of the testator's son for his benefit, and at his death the trustees were to divide the estate among the testator's nephews and nieces for their lives, the share of each nephew or niece to go over to his or her children or legal

<sup>1</sup> *Hills v. Simonds*, 125 Mass. 536.

A provision in a will, that if any of certain grandchildren die, leaving no issue alive, the share of the one so dying shall be equally divided among the brothers and sisters, includes brothers and sisters born after the testator's death as well as those born before. *Madison v. Larmon*. 48 N. E. Rep. 556 (Ill.).

representatives. The court held that the trust terminated at the death of the testator's son, and that the estate took effect in possession at that time in the nephews and nieces for their lives, and that they took vested shares at the testator's death.<sup>1</sup> The death of the son was therefore the period of distribution, and, while the class could open to let in the after-born members of it, no after-born member could be included who should be born after the death of the son, because at that time the estate took effect in possession. It is plain that the gifts to the children or legal representatives of nephews and nieces, who were living at the testator's death, were good. It is plain that gifts to the children or legal representatives of after-born nephews and nieces would be void as too remote, and that, as to these shares, the testator would die intestate as to the capital. But the remoteness of certain possible shares did not affect the validity of other shares otherwise validly created. In point of fact there were no after-born nephews or nieces, but this fact was immaterial in testing the question whether the gifts were void or valid. The words "legal representatives," above, "personal representatives," "representatives," are in every-day use in wills, and *prima facie* they mean the person's executor or administrator; but the context of the will sometimes shows that they are

<sup>1</sup> That this trust terminated at the time above mentioned see this same will passed upon in *Simonds v. Simonds*, 112 Mass. 164, 165.

See further as to a trust ceasing under a provision "to divide," or under a provision of similar import, *Heard v. Read*, 171 Mass. 376, 377; *Heard v. Trull*, 175 Mass. 239, 242; *Madison v. Larmon*, 28 Chicago Legal News, 231; *In re Wing's Estate*, 48 N. E. Rep. 540 (N. Y.); *O'Donoghue v. Boies*, 53 N. E. Rep. 538, 539 (N. Y.).

As to the duration of a trust, see further, *Angus v. Noble*, 46 Atl. Rep. 278 (Conn.); *Humphreys v. Wilton*, 176 Mass. 451; *Kernochan v. Marshall*, 59 N. E. Rep. 293 (N. Y.).

In Chapter XVI., in considering the rule in *Shelley's Case* we showed the force of the expression that the trustees are "to convey;" and in Chapter XII. we considered the case of *Dakin v. Savage*, 172 Mass. 23, in which the court held that there was an implied provision that the trust should continue until the trustees should make a conveyance.

intended to mean the distributees under the statute of distributions.<sup>1</sup>

*Dorr v. Lovering*<sup>2</sup> was a case of a devise to trustees for the testator's daughter for life, and then to her children for life; and, as these children should de cease, then to their respective heirs at law. The testator's daughter had some children who were living at the testator's death. It appeared, then, that the gifts to the heirs at law of these children would necessarily take effect before the expiration of the perpetuity period. But there was a possibility that the testator's daughter might have more children, and it is evident that the gifts to the heirs at law of these possibly after-born members would be void as too remote. The question, then, was whether this vitiated all the gifts, and it was held that it did not, because the gifts were separable. The lines did not cross. Of course, the gifts to all of these grandchildren for their lives were good, and the gifts to their heirs at law were good, except the gifts to the heirs at law of after-born members.

Some wills are so expressed with reference to limitations of property in trust, in which there is a life interest with a limitation over to a class, that the class closes at the death of the testator.<sup>3</sup> Others are so expressed that the class closes at the expiration of the life interest.<sup>4</sup> What we are here to

<sup>1</sup> 2 Jarman on Wills (6th ed. by Bigelow), 957, 964, 966; *In re Ware*, 45 Ch. Div. 269, 277; *Johnson v. Edmond*, 33 Atl. Rep. 503 (Conn.); *Bates, Petr.*, 159 Mass. 258, 259; *Eager v. Whitney*, 163 Mass. 465; *Olney v. Lovering*, 167 Mass. 448; *In re Horner*, *Eagleton v. Horner*, 37 Ch. Div. 695; *Cox v. Curwen*, 118 Mass. 200.

<sup>2</sup> *Dorr v. Lovering*, 147 Mass. 532, 535, 536. So also, *In re Russell* (1895), 2 Ch. 698; *Bates v. Kesterton* (1896), 1 Ch. 162.

Professor Gray claims in his work on Perpetuities that the principle of *Hills v. Simonds* has not been recognized in some other Massachusetts cases, and he is sustained in that position by *Dorr v. Lovering*, in which the court overrules an earlier case and decides according to *Hills v. Simonds*.

<sup>3</sup> 2 Jarman on Wills (5th ed. by Bigelow), 155, 156; *Tudor's Lead. Cas.* (3d ed.) 800-802 *et seq.*

<sup>4</sup> 2 Jarman on Wills (5th ed. by Bigelow), 156, 157; *Tudor's Lead. Cas.* (3d ed.) 802, 803.

consider, however, is the subject of the closing of the class when the class is left open, at least until the first member of the class to attain a given age reaches that age. The expression "the closing of the class," the expression "the fixing of the shares," the expression "the period of distribution," all mean the same thing; for when the period of distribution is reached the shares of the members of the class must be fixed, in other words, the class must be closed, that is to say, no after-born member can be included. Now, the rule is, in the matter we are here considering, that the class closes when the last of two events shall occur. These two events may be either, first, the death of the testator and the attainment of the given age by the first member of the class to reach that age, or, secondly, the expiration of the preceding life interest and the attainment of the given age by the first member of the class to reach that age. The future event may be something other than the attainment of a given age, as, for instance, marriage. As to the first of these propositions we shall illustrate it presently by a case involving a question under the rule against perpetuities. As to the second of these propositions we shall illustrate it more simply by supposing the age mentioned to be twenty-one. Now suppose, for illustration, that real or personal property or both be limited in trust for the benefit of A for life, and then over to the children of B limited to them with reference to their attainment of twenty-one years of age. It is immaterial for our present purpose whether the limitation to the children be made by vested language, or whether it be made by contingent language. Now, suppose that one of these children attain the age of twenty-one during the lifetime of A, there is no reason why that should close the class, but when A comes to die that event closes the class, and that is the last of the two events to occur. At that time the member who has reached the age of twenty-one is entitled to his share of the property, in other words, the estate has begun to take effect in possession.

Now suppose, on the other hand, that when A comes to die no member of the class has reached the age of twenty-one; there is no reason why the class should close, for the period of distribution has not arrived; but whenever the first member of the class to reach twenty-one has reached that age, that is the last of the two events to occur, and that closes the class, no after-born member can be admitted, the period of distribution has arrived.<sup>1</sup>

These principles have no application to legal remainders, for the obvious reason that they must arise immediately upon the expiration of the particular estate. But the application of these principles is to other limitations over, therefore, to executory devises, to legal limitations of personalty, to equitable limitations of personalty, and to equitable limitations of real estate. A question has been raised as to whether these principles apply to a legal limitation of personalty when no member of the class has come into existence at the expiration of the preceding life interest. The better view is that they do apply in this case also.<sup>2</sup> We have already referred to some late legislation in England and in a few states of this country under which a remainder may arise after the expiration of the particular estate, and we suppose in such jurisdictions the above principles will be held to apply to a legal remainder of real estate. Now, we notice one striking resemblance in the application of the above principles to the case of a legal remainder of real estate, and that is in this respect, that an estate will not be kept open for after-born members after it has taken effect in possession. In marriage settlements we find an exception; but Jarman says that this is of little

<sup>1</sup> *In re Coppard's Estate*, 35 Ch. Div. 350; *In re Russell* (1895), 2 Ch. 698; *In re Knapp's Settlement*, *Knapp v. Vassall* (1895), 1 Ch. 91; *In re Mervin* (1891), 3 Ch. 197; *Hubbard v. Lloyd*, 6 Cush. 522; *Williams*, R. P. (17th ed., Am. notes) 431; *Tudor's Lead. Cas.* (3d ed.) 800-802, 804, 805, 806, 807; 2 *Jarman on Wills* (5th ed. by Bigelow), 155, 156, 157, 160 and note 1, 161 *et seq.*, 171-174, 176; *Hawkins on Wills* (2d Am. ed.), 76, 77.

<sup>2</sup> See the authorities in note 1, above.

practical importance, because in marriage settlements one at least of the parents of the children usually takes a life interest, so that there are no after-born members.<sup>1</sup>

If there be a gift to a class amenable to the rule against perpetuities, which would be to the testator's grandchildren, or to the children of any third person, as before shown, so limited as to be contingent upon the attainment of an age exceeding twenty-one, the fact that some member of the class is in existence at the testator's death will not save the gift from being void as too remote, because he may die without reaching the age, and the class may ultimately consist of persons who were not born at the testator's death;<sup>2</sup> but, as shown above, this would be good if limited as a true contingent remainder, and regardless of whether any member of the class was in existence or not. But suppose, in the case of a contingent gift to take effect at an age exceeding twenty-one, not limited by way of remainder, and with no preceding life interest, some member of the class has actually reached the age before the death of the testator. In this case the death of the testator is the last event to occur, and this closes the class, so that, even if it be contingent, and the age be twenty-five, and the class be grandchildren of the testator or the children of any third person, the gift is good, because the persons entitled to take are all of them lives in being at the testator's death. This is shown in the late case of *Picken v. Matthews*.<sup>3</sup> In this case there was no preceding life interest. The class was the grandchildren of the testator, the age twenty-five, and the court held that should the language of the gift be taken to be contingent, yet that the gift was good, not void as too remote, because the death of the testator had

<sup>1</sup> 2 Jarman on Wills (5th ed. by Bigelow), 161; Tudor's Lead. Cas. (3d ed.) 805.

<sup>2</sup> Gray on Perp. §§ 372, 373, 374, 377; Tudor's Lead. Cas. (3d ed.) 475 *et seq.*

<sup>3</sup> *Picken v. Matthews*, 10 Ch. Div. 267 *et seq.*; Marsden on Perp. 67; *Cowles v. Cowles*, 56 Conn. 240; *In re Mervin* (1891), 3 Ch. 197.

closed the class, one member having attained the age during the testator's lifetime.

It has already been sufficiently noticed that the rule against perpetuities does not apply to vested gifts. Referring now to the rules relating to vested and contingent language, there are very many cases, and generally they are cases of active trusts in limitations to a class of persons amenable to the rule against perpetuities, which, as we have seen, would be the children of any third party, or, what comes to the same thing, the grandchildren of the testator, and vested language is used. Suppose, then, that the beneficiaries are given their gifts by vested language, but that the time for payment or distribution is postponed until the attainment of an age exceeding twenty-one, for example, twenty-five. Now, in some of these cases the gifts are contingent in them until certain events shall occur, for example, the expiration of a preceding life interest; but vested language is used so that the shares must vest in them, if ever, within the perpetuity period, but the age mentioned for distribution exceeds twenty-one. Sometimes there are in such cases provisions for the accumulation of the income until the age is reached. Now these gifts are all perfectly good, because they must vest in interest sufficiently early, and, in order that the possession may not be postponed, the courts cut down the age to twenty-one years.<sup>1</sup>

The next question is, suppose these gifts, though vested, to be defeasible upon the condition subsequent of not attaining the specified age. The limitations over in such cases are void as too remote, because the courts will not cut down the age in order to give validity to the limitations over.<sup>2</sup> We

<sup>1</sup> *Hardcastle v. Hardcastle*, 1 H. & M. 405, 412; *Dodson v. Hay*, 3 Brown's Ch. Cases, 404; *Picken v. Matthews*, 10 Ch. Div. 264; *Goodiar v. Johnson*, 18 Ch. Div. 441; *Hobbs v. Parsons*, 2 Sm. & Giff. 212; *James v. Lord Wynford*, 1 Sm. & Giff. 40; *Marsden on Perp.* chap. 11; *In re Beavan's Trusts*, 34 Ch. Div. 716; *Howe v. Hodge*, 152 Ill. 252; *In re Torney* (1899), 2 Ch. 739; *Tudor's Lead. Cas.* (3d ed.) 491, 492.

<sup>2</sup> *Blease v. Burgh*, 2 Beav. 221; *Marsden on Perp.* chap. 11; *Hobbs v. Parsons*, 2 Sm. & Giff. 212; *Hardcastle v. Hardcastle*, 1 H. & M. 405;



have already seen that the limitations over are void as too remote in the case of contingent gifts, in which the age exceeds twenty-one, and the same principle applies in this case as to the limitations over.

In *Edgerly v. Barker*<sup>1</sup> there was a trust of real and personal property in favor of the testator's grandchildren, the period of distribution to be when the youngest grandchild should attain the age of forty years, and in case of the death of a grandchild leaving issue living at that time, the issue to take *per stirpes*. To explain that expression, *per stirpes* means taking by the stock, and is in contrast with *per capita*, or taking by the head. For example, if there be A and B, and A die leaving one child, and B die leaving two children, then if they take *per capita* each child takes one-third; but if they take *per stirpes*, A's child takes one-half, and B's children take the other one-half. Now, the language of the will in this case was contingent language, and here is the peculiarity of the case, namely, that, in order to save the gifts from the rule against perpetuities, the New Hampshire court cut the age down from forty to twenty-one. In the Harvard Law Review,<sup>2</sup> Professor Gray attacked the decision and pointed out that this method of dealing with the subject had the effect of giving the property to what might be a totally different set of people from those to whom the testator had given it, for that those who should be alive to take when the youngest grandchild should reach twenty-one, might not be the same persons as those who should be alive to take when the youngest grandchild should reach forty; but that in the case in which vested language is used this result would not be reached by cutting down the age, because the shares of the members of the class are fixed by the vesting, and the

*In re Edmondson's Estate*, 5 Eq. 389; *Harrison v. Grimwood*, 12 Beav. 192; *Taylor v. Frobishur*, 5 DeG. & Sm. 191; *In re Baxter's Trusts*, 10 Jur. N. S. 845; Gray on Perp. § 372; *Howe v. Hodge*, 152 Ill. 252.

<sup>1</sup> *Edgerly v. Barker*, 31 Atl. Rep. 900 (N. H.).

<sup>2</sup> 9 Harv. Law Rev. 242.

age specified merely postpones the time of distribution. But Doe, C. J., who delivered the opinion, says in the opinion that he thinks it is better to uphold the gifts *cy pres*, that is, as near as possible to the intention of the testator, than to defeat them altogether. The case, however, is a decided innovation upon what had been regarded as well settled principles.

We now come to the question, what is the philosophy of the rule against perpetuities? Professor Gray says in his *Perpetuities* that the true test of the rule against perpetuities is, when may an interest begin, which means, may it vest in interest at too remote a time; but, he says, there are cases in which the test of the application of the rule against perpetuities has been, how long may an interest last; and, he adds, if there be an active trust to A and his heirs for the benefit of B and his heirs, it is true that the equitable fee simple of B may last forever, but that it is not a void trust because of the rule against perpetuities, for that the trust is perfectly good; the equitable fee simple of B may last forever, but so may a legal fee simple last forever, and that B may at any time terminate the trust by demanding a conveyance from the trustee.<sup>1</sup> As to the attempt to create a private perpetual trust (for the matter of gifts to public charities in distinction from private gifts, we shall consider later), we cordially agree with Professor Gray that the trust is perfectly good, and that the rule against perpetuities has nothing to do with it. In *Bartlett, Petitioner*,<sup>2</sup> there was a bequest of money to trustees to pay the

<sup>1</sup> Gray on Perp. §§ 140, 232-246, 236 note 4, 412, 413, 590, 591.

And that the *cestui que trust* can at once demand from the trustee a conveyance, see also *Harlow v. Cowdrey*, 109 Mass. 184; *Passman v. Guarantee Co.*, 41 Atl. Rep. 953 (N. J. Ch.); *Nye v. Koehne*, 47 Atl. Rep. 215 (R. I.).

<sup>2</sup> *Bartlett, Petr.*, 163 Mass. 512, 517.

But in Rhode Island, in *Williams v. Herrick*, 32 Atl. Rep. 913 (R. I.), the court pronounces such a trust to be bad because of the rule against perpetuities. *Slade v. Patten*, 68 Me. 380, has been declared to be overruled in *Pulitzer v. Livingston*, 36 Atl. Rep. 635 (Me.).

income to A and his heirs. The court said this was an attempt to create a private perpetual trust, and that A was entitled to have the principal paid over to him by the trustees immediately. The court said nothing about the rule against perpetuities, and the indication is that the trust was regarded as good, but, of course, determinable at any moment by the *cestui que trust*.

Turning now to a case in which an attempt to create a private perpetual trust is manifestly bad, we have the case of *St. Paul's Church v. Attorney-General*,<sup>1</sup> in which there was a deed to trustees of certain pews in a church. The trustees were to retain the pews forever and out of the rents received to build up a fund by investment, and a portion of the income to be derived from the investment was to be paid from time to time to the donor or to his nearest heir bearing the family name who should demand it. It is evident that this trust was bad, and it would have been enough to say that it was bad because of a perpetual restraint upon alienation; but the court did not put their decision upon this ground, but upon the ground that it offended the rule against perpetuities in that it might be beyond the perpetuity period before the donor would have a nearest heir bearing the family name, and, even if there should be one, that it might be beyond the perpetuity period before such person would demand it. This is a distinct recognition of the beginning theory discussed above.

Having above given one of the phases of the duration theory, namely, the attempt to create a private perpetual trust, we will now give another phase of the duration theory.

<sup>1</sup> *St. Paul's Church v. Attorney-General*, 164 Mass. 197, 199, 201.

For other late cases to the effect that the object of the rule against perpetuities is to prevent the creation of interests on remote contingencies, in other words, cases which recognize the beginning theory, above, see *Howe v. Hodge*, 152 Ill. 252; *Madison v. Larmon*, 28 Chicago Legal News, 231; affirmed on appeal, 48 N. E. Rep. 556, 558 (Ill.); *Pulitzer v. Livingston*, 36 Atl. Rep. 635 (Me.); *Brooks v. Belfast*, 38 Atl. Rep. 222 (Me.).

In *Winsor v. Mills*,<sup>1</sup> two men, A and B, owning neighboring lots of land, created a trust by deed, and the deed provided that neither of these lots should be sold without the consent of the owners of both lots. The court pronounced this trust void, both as being in general restraint of alienation and as offending the rule against perpetuities.

Coming to the next phase of the duration theory, *Thomas v. Gregg*<sup>2</sup> is an illustrative case. It was a devise to the testator's daughter for her life with a power given her to appoint among her children. She appointed by her will the property to her children absolutely, but she imposed a trust which might last throughout the lives of all her children. The Supreme Court of Maryland held that this appointment was bad, because the trust might last longer than the perpetuity period. Now, it is evident in this case that the interests of the children began sufficiently early, because they must take vested interests not later than the death of their mother, who was a life in being at the testator's death. We think that this phase of the duration theory is not sound, is not good law.

There is a considerable number of late cases of trusts for sale in which the trust has been held void, because it may be executed at a time beyond the perpetuity period, during which time the land or personalty may be encumbered by the trust. *In re Daveron*<sup>3</sup> was a case of a trust for sale, the trust to be executed after the expiration of a lease which had forty-nine years to run. It was held that the trust was void, the period not being measured by lives in being, but by a term in gross which exceeded twenty-one years; but the *cestuis que trust* who would have taken the proceeds of the sale were all ascer-

<sup>1</sup> *Winsor v. Mills*, 157 Mass. 364-366.

<sup>2</sup> *Thomas v. Gregg*, 76 Md. 169. See further, *Missionary Soc. v. Humphreys*, 46 Atl. Rep. 320 (Md.); *Hamlin v. Mansfield*, 33 Atl. Rep. 788 (Me.); *Siedler v. Syms*, 38 Atl. Rep. 424 (N. J.); *Prettyman v. Baker*, 46 Atl. Rep. 1024 (Md.).

<sup>3</sup> *In re Daveron* (1893), 3 Ch. 421. See also *In re Johnston's Estate*, 39 Atl. Rep. 879 (Penn.).

tainable within the perpetuity period, and the gifts to them of the property were sustained. *Goodier v. Edmands*<sup>1</sup> was a case of a trust for sale which might be executed at a time more remote than lives in being and twenty-one years and nine months. The trust was held void as too remote, but the *cestuis que trust* were ascertainable within the perpetuity period and were allowed to take the property. In *In re Wood*<sup>2</sup> there was a trust for the sale of the testator's gravel pits when they should be worked out. The trust was held void as repugnant to the rule against perpetuities.

Of late years, owing to the rapid rise in the value of land in the suburbs of cities, it has become very common to form land companies, and the following cases are of that description. It is important to know the terms and conditions under which these companies can be validly formed, and it is important to observe that the element of control is regarded as being a material circumstance in respect to the matter of the rule against perpetuities. We have heretofore seen that a contingent interest subject to an estate tail is not obnoxious to the rule against perpetuities, because the tenant in tail from time to time always has the control, and this principle of law may with propriety be applied to any case in which there is control. In *Seamans v. Gibbs*<sup>3</sup> there was a trust created, under which the trustee had the right to sell gravel, loam, and wood from the land, also to sell the land in lots, or the whole tract, and, in any of these cases, to divide the proceeds among the *cestuis que trust*. The trust might, perchance, last forever. It was held good on the ground that the *cestuis que trust* could at any time join in the conveyance. *Pulitzer v. Livingston*<sup>4</sup> was this: A man owned a large tract of timber land in Maine, and he conveyed it to trustees for the purpose of

<sup>1</sup> *Goodier v. Edmands* (1893), 3 Ch. 455.

<sup>2</sup> *In re Wood* (1894), 2 Ch. 310; affirmed on appeal (1894), 3 Ch. 381.

<sup>3</sup> *Seamans v. Gibbs*, 132 Mass. 239.

<sup>4</sup> *Pulitzer v. Livingston*, 36 Atl. Rep. 635 (Me.).

marketing it from time to time. The trustees sold a lot. The purchaser sold to A, and A sold to B. The deed to B contained the usual covenant against incumbrances and a special covenant. B sued A for breach of these covenants, claiming that they were broken, because the trust for sale was bad, because of the rule against perpetuities. The Supreme Court of Maine held that it was good, and pointed out that the trust deed contained a clause of revocation of the trust empowering the *cestuis que trust* and each one of them to terminate the trust at any time. Here, then, was that power of control, above mentioned; but the court said, of course by way of *dictum*, that the trust would have been equally good had there been no clause of revocation.<sup>1</sup> In *Howe v. Morse*<sup>2</sup> a large tract of land was conveyed to trustees, and the interests of the *cestuis que trust* were divided into shares, for which certificates were given, and they were marketable just like shares of corporate stock. The deed provided that the shares should be personal property, a provision which is getting to be very common of late years when land is conveyed in trust by deed. The Massachusetts court had no occasion, they said, to express an opinion as to whether a provision for making the equitable interest in the land to be personal property was valid or not. The deed provided that a sale of any lot by the trustees should be approved by a three-fourths vote of the shares, and that the trust could be terminated at any time by a similar vote. It was held that the trust was good, for that the control by three-fourths of the shares was sufficient to give the transaction validity, and that the trust was not within the rule against perpetuities and was not an illegal restraint upon alienation. Now, considering the practical convenience of forming these land companies, this decision commends itself as making the law bend to the practical needs of the community.

<sup>1</sup> *Pulitzer v. Livingston*, 36 Atl. Rep. 638 (Me.).

<sup>2</sup> *Howe v. Morse*, 174 Mass. 491.

Take a case of a devise or bequest to certain living persons for their lives, and then over to an unborn child until it dies or changes its name, and then over to certain ascertained persons. This is all good, and it is a very good illustration of the principle already observed that the rule against perpetuities does not apply to vested interests. It is true that the unborn child may change its name at a time beyond the perpetuity period; but this is immaterial, because the ultimate gift is vested from the time of the testator's death, and, should the child change its name, it would only accelerate the possession of the ultimate interest. The ultimate takers are bound to have the succession in any possible event: first, if no child be born; secondly, if it changes its name; thirdly, if it does not change its name, then at its death.<sup>1</sup>

If there be a gift to a public charity and then over to an individual, to go over at a time which may be beyond the perpetuity period, the gift over is void as too remote. Conversely, if there be a gift to an individual and then over to a public charity, which may go over too remotely, the gift over is void as too remote.<sup>2</sup> But if there be a gift to a public charity and then over to another public charity, which may go over at a time beyond the perpetuity period, the gift over is valid. The ground is that the land is locked up from alienation any way, being in the hands of a public charity, and that there is no objection to its passing to another public charity at any time whatever. The case which decides this last point is *Christ's Hospital v. Grainger*,<sup>3</sup> and it establishes what is the recognized law upon this point. Professor Gray has objected to the decision on the ground, already pointed out, that the test of the rule against perpetuities is, when may

<sup>1</sup> *In re Roberts*, 19 Ch. Div. 520; Gray on Perp. § 209.

<sup>2</sup> *Odell v. Odell*, 10 Allen, 7; *Jackson v. Phillips*, 14 Allen, 572 and 573; *In re Bowen*, *Lloyd Phillips v. Davis* (1893), 2 Ch. 491; *Society, etc. v. Attorney-General*, 135 Mass. 285; *Rolfe v. Lefebvre*, 45 Atl. Rep. 1087 (N. H.).

<sup>3</sup> *Christ's Hospital v. Grainger*, 1 Macnaghten & Gordon, 460.

the interest begin? in other words, that the test is, is the interest limited upon a condition precedent which may be too remote? He therefore argues that the limitation over to the second public charity ought to have been held void, as much so as though it had been limited to an individual.<sup>1</sup>

The next point is, if there be a gift to a public charity upon some contingency which may occur beyond the perpetuity period, there being no preceding gift, the gift to the public charity is void as too remote.<sup>2</sup>

Finally, a gift may be made to a public charity not yet in existence, and which may not come into existence, perhaps, till a time beyond the perpetuity period, and the gift is good.<sup>3</sup>

We have already considered the case of *St. Paul's Church v. Attorney-General*<sup>4</sup> with reference to a gift to a private individual, and have stated how that the pews in the church belonging to the donor were to be held forever by the trustees, the rents thereof to be forever accumulated, and now we state that a portion of the income to be derived from the accumulations was to be paid forever to some department of St. Paul's Church, which is a public charity. It was held that this gift was good, and that the court of equity would not order the accumulations to be stopped, or the accumulated funds to be paid over to the charity, and would not at any future time interfere with the directions of the donor, unless the court of equity should see some good reason for doing so.

We are now in a position to discuss some of these theories

<sup>1</sup> Gray on Perp. §§ 589 *et seq.*, 600-602.

<sup>2</sup> *In re* Lord Stratheden and Campbell (1894), 3 Ch. 265; Gray on Perp. §§ 606, 607, 677; *In re* Bowen, Lloyd Phillips *v.* Davis (1893), 2 Ch. 491, 494; Brooks *v.* Belfast, 38 Atl. Rep. 222 (Me.).

<sup>3</sup> Odell *v.* Odell, 10 Allen, 7; Ingraham *v.* Ingraham, 48 N. E. Rep. 568 *et seq.* (Ill.); Capen *v.* Skinner, 177 Mass. 84.

<sup>4</sup> *St. Paul's Church v. Attorney-General*, 164 Mass. 204, 205. See further, Brooks *v.* Belfast, 38 Atl. Rep. 222 (Me.); Webster *v.* Wiggins, 31 Atl. Rep. 824 (R. I.); Ingraham *v.* Ingraham, 48 N. E. Rep. 561 (Ill.).

A bequest to Harvard College for the education of lineal descendants of testator's grandparents is a good charitable bequest. Dexter *v.* Harvard College, 176 Mass. 192.



concerning the rule against perpetuities. And first we would say that the fact that the estate may be locked up from free and complete alienation may be an incident in the beginning theory ; but it is not necessarily an incident, as shown by such cases as *Dorr v. Lovering*,<sup>1</sup> in which the life interests might endure beyond the perpetuity period, and yet they must begin sufficiently early. There are four and perhaps five phases of the duration theory, as follows. First, the theory that an attempt to create a private perpetual trust is within the rule against perpetuities. Secondly, the theory, as enunciated in *Winsor v. Mills*,<sup>2</sup> that a trust under which separate parcels of land could not be sold without the consent of the owners thereof was void, not only as involving a general restraint upon alienation, but as within the rule against perpetuities. Thirdly, the Maryland doctrine as enunciated in *Thomas v. Gregg*,<sup>3</sup> in which, as above shown, there was a devise to the testator's daughter for her life, with a power given her to appoint among her children. She appointed by her will the property to her children absolutely, but she imposed a trust which might last throughout the lives of all her children. The Supreme Court of Maryland held that this appointment was bad, because the trust might last longer than the perpetuity period. It is evident that the interests of these children began sufficiently early. Fourthly, the principle of *Christ's Hospital v. Grainger*,<sup>4</sup> above stated, in which there was a gift to a public charity and then over to another public charity, the gift to go over at a time which might be beyond the perpetuity period. The gift over was held to be good, because the property was locked up from alienation anyway in the hands of the first public charity, and that there was no objection to its passing to another public charity at any time whatever. It is evident that this case

<sup>1</sup> *Dorr v. Lovering*, 147 Mass. 532, 535, 536.

<sup>2</sup> *Winsor v. Mills*, 157 Mass. 364-366.

<sup>3</sup> *Thomas v. Gregg*, 76 Md. 169.

<sup>4</sup> *Christ's Hospital v. Grainger*, 1 Macnaghten & Gordon, 460.

does not involve the beginning theory, because the limitation over might begin too remotely, and yet it was held good; for, if the beginning theory had been applied, the limitation over would have been void as too remote. Fifthly, trusts for sale may be, perhaps, a phase of the duration theory.

The duration theory and the beginning theory are distinct theories, and, except in the extreme cases, are consistent with each other. They are both recognized in *Winsor v. Mills*.<sup>1</sup> Now, it should be pointed out, whatever value one may attach to any or all of the phases of the duration theory, that the rule against perpetuities is always formulated in terms of the beginning theory, and is stated in that formula with reference to voidness.

These two broad theories, the beginning and the duration, are exclusive of each other; that is, a man may wholly believe in one and wholly reject the other. Suppose that an advocate of the duration theory were asked, "What do you say as to the validity of a limitation of a fee simple which may become vested at a time beyond the perpetuity period?" He might logically answer, "I believe it to be good, because, according to the duration theory, the test is, may an interest last too long; and this cannot be bad on that account, because if it were bad on that account every fee simple would be void, although limited to vest immediately." But he probably would be found to believe it would be bad because it may begin too late, and probably would be found to be a believer in the beginning theory under modifications; for instance, suppose there be a gift to testator's daughter for life and then over to her children for their lives, and then over upon some contingency which might occur beyond the perpetuity period, in fee simple, so that the fee simple might be contingent until a time which is too remote. A believer in some of the phases of the duration theory might pronounce the gifts to the daughter's children as bad, but, when asked how about the

<sup>1</sup> *Winsor v. Mills*, 157 Mass. 364-366.

fee simple, his objection would have to be, if any, that it is bad because it may begin too remotely. But a believer in the beginning theory might very reasonably have no faith in any one of the phases of the duration theory, and a person may believe in one or more of the phases of the duration theory without believing in all of the phases of that theory.

Take the case of a fee simple, and the same would, of course, be true of a transmissible interest in personalty, which is limited so that it may possibly vest in interest at a time beyond the perpetuity period. Now, there are cases in which this is void as too remote, although the intermediate estate or estates cannot last too long. This is shown by such cases as *Dorr v. Lovering*<sup>1</sup> and *In re Roberts*,<sup>2</sup> and it is also shown in one of the cases of a gift to a public charity. We have seen above, if there be a gift to a public charity and then over upon a remote contingency to an individual, that the gift over to the individual is void as too remote, yet the gift of the intervening interest cannot last too long, and, if the gift over were to another public charity, the gift over would be good, as shown in *Christ's Hospital v. Grainger*, above. In the case in which the gift over to the individual is bad as too remote, it is bad because it may begin at too remote a time. In *Dorr v. Lovering*<sup>3</sup> there was a devise to trustees for the testator's daughter for life, and then to her children for life, and as these children should de cease, then to their respective heirs-at-law. The testator's daughter had some children who were living at the testator's death. It appeared, then, that the gifts to the heirs-at-law of these children would necessarily take effect before the expiration of the perpetuity period. But there was a possibility that the testator's daughter might have more children, and it is evident that the gifts to the heirs-at-law of these possibly

<sup>1</sup> *Dorr v. Lovering*, 147 Mass. 532, 535, 536.

<sup>2</sup> *In re Roberts*, 19 Ch. Div. 520.

<sup>3</sup> *Dorr v. Lovering*, 147 Mass. 532, 535, 536.

after-born members would be void as too remote. The gifts to all of these grandchildren for their lives were held to be good, and the gifts to their heirs-at-law were good, except the gifts to the heirs-at-law of after-born members. In this case, then, the gifts to the heirs of unborn grandchildren of the testator were void because they might begin at too remote a time, but the intermediate interests were all of them held to be good, and thus that they could not last too long. Then, again, take the case of *In re Roberts*.<sup>1</sup> This was a bequest in trust to certain living persons for their lives, and then over to an unborn child until it dies or changes its name, and then over to certain ascertained persons. This is all good. Now if we were to change this case so that the ultimate limitation over would be contingent until too remote a time, it would be bad, because it might begin too remotely; but this would not affect the intermediate interests which were held to be good. They did not last too long.

As to trusts for sale, we think that the trust for sale would be good provided there is control. It may be argued, then, that the trust for sale is not void because the purchaser at the trust sale may take at too remote a time; for, if that were so, the trust would be void even though there were control. It may be argued, then, that trusts for sale are one phase of the duration theory.

The attempt to create a private perpetual trust is not void as offending the rule against perpetuities, because the *cestui que trust* has the control; or, at least, it is good for that reason whether the rule against perpetuities be a feature of the question or not.

The Maryland case of *Thomas v. Gregg* is the extreme view of the duration theory. Professor Gray's view of *Christ's Hospital v. Grainger* is the extreme view of the beginning theory.

<sup>1</sup> *In re Roberts*, 19 Ch. Div. 520.

## CHAPTER XXIV.

RIGHTS OF ENTRY FOR CONDITION BROKEN, AND RIGHTS  
OF ENTRY UPON DISSEISIN.

WE have already seen three elementary propositions: first, that conditions subsequent, or, as they are often called, rights of entry for condition broken, can only be reserved to the grantor and his heirs; secondly, that, when we are dealing with conveyances of the fee, such rights are unassignable; and thirdly, when we are dealing with conveyances of the fee, that any attempted assignment of them extinguishes them. It is common language of the books to speak of a right of entry for condition broken as such, whether the condition has been broken or not. We now introduce the other element connected with this subject, which is, rights of entry upon disseisin. It is very common to speak of rights of entry for condition broken as possibilities of reverter, but the true classification is to place them in the category with rights of entry upon disseisin, for they are all of them rights of entry, and an attempted assignment of them extinguishes them.

The feoffment, fine, and common recovery, the three greatest of the common-law conveyances, not only passed whatever title the man had at the time, but, by estoppel, all rights which he might afterward acquire in the land.<sup>1</sup> The fine is technically regarded as a feoffment of record, and the common recovery, as in the nature of a feoffment of record;<sup>2</sup> but,

<sup>1</sup> Note to the *Duchess of Kingston's Case*, 2 *Smith's Lead. Cas.* (8th ed.) 835, 836; *Co. Litt.* 9 b, 10 a, 49 a.

<sup>2</sup> Note to the *Duchess of Kingston's Case*, 2 *Smith's Lead. Cas.* (8th ed.) 835, 836; *Co. Litt.* 9 b, 10 a, 49 a.

says the note to the *Duchess of Kingston's Case*,<sup>1</sup> the deed of grant passed only what was possessed at the time, so that a right of entry or of action, not having been reduced to possession, could not be transferred by it. Furthermore, for a man to convey by feoffment he has got, at common law, to enter upon the land and make his livery of seisin, or, as shown in an early chapter, go very near it in some exceptional cases. In other words, he has got to enter; so, of course, he could not convey a right of entry by a feoffment, but he could undertake to convey it by fine or recovery, and, should he do so, he would really convey nothing, and, moreover, would extinguish his right.<sup>2</sup> This same principle applies to rights of entry for condition broken.<sup>3</sup> The operation of the fine or recovery was that it acted as a release to the party in possession of the land.<sup>4</sup> Now, it must not be supposed that a man had to have the actual possession of the land in order to convey a property right by fine or recovery, but, we may use the expression, that in order to convey by fine or recovery or by grant, the interest must be vested in possession.<sup>5</sup> Thus, we may regard a vested remainder and a reversion as vested in possession, and these were conveyable by fine and recovery as well as by grant, like other incorporeal hereditaments. The best illustration of the incorporeal hereditament is that of rents. People were said to be seised of them. They were conveyable by fine, recovery, and by grant.<sup>6</sup> We may well say of them, too, that they were vested

<sup>1</sup> Note to the *Duchess of Kingston's Case*, 2 *Smith's Lead. Cas.* (8th ed.) 835, 836.

<sup>2</sup> Note to the *Duchess of Kingston's Case*, 2 *Smith's Lead. Cas.* (8th ed.) 835, 836; 1 *Preston on Conv.* 208, 209, 302; *Co. Litt.* 49 a, 214 a; 2 *Smith's Real & Per. Prop.* (5th ed.) 964, 991, 992; *Butler's note to Co. Litt.* 330 b.

<sup>3</sup> *Rice v. Boston & Worcester R. R.*, 12 *Allen*, 142; *Co. Litt.* 214 a.

<sup>4</sup> 2 *Smith's Real & Per. Prop.* (5th ed.) 964, 991, 992.

<sup>5</sup> Note to the *Duchess of Kingston's Case*, 2 *Smith's Lead. Cas.* (8th ed.) 835.

<sup>6</sup> See the note at the end of Chapter III.

in possession, but in none of these cases was there possession of the land itself. But the executory devise, as already shown, was not assignable at law. It was of an essentially executory nature and not of a vested nature. The contingent remainder appears to be an exception, for, if it were contingent upon the event and not upon the person, it was, as shown in a former chapter, assignable by fine and, perhaps, by recovery.

In this chapter when dealing with the assignment of rights of entry for condition broken or conditions subsequent we mean, except where we explicitly indicate otherwise, to confine our attention to cases in which these rights are annexed to a conveyance or gift of the fee.

Before the Massachusetts statute of 1891, soon to be referred to, the Massachusetts courts broke away from the common law in the matter of rights of entry upon disseisin. They have never broken away in the matter of rights of entry for condition broken. They came to hold that, while a right of entry upon disseisin is absolutely unassignable, yet that an attempted assignment did not extinguish the right, and that the grantee to whom the disseisee had conveyed the land could bring a writ of entry against the disseisor using the name of his grantor as demandant, and further, that, if the grantee got into possession of the land so that the disseisor had to bring a writ of entry against him, the grantee could rely upon the deed to him as a defence.<sup>1</sup>

There is much statutory law in the United States making rights of entry upon disseisin assignable, and the Massachusetts statute of 1891 is one of these statutes.<sup>2</sup> In New Jersey there is a late statute making rights of entry for condition broken assignable.<sup>3</sup>

<sup>1</sup> *McMahon v. Bowe*, 114 Mass. 145; *Rawson v. Putnam*, 128 Mass. 553, 554; *Farnum v. Peterson*, 111 Mass. 151; *Snow v. Orleans*, 126 Mass. 457; *Faxon v. Wallace*, 101 Mass. 446; *Faxon v. Wallace*, 98 Mass. 45.

<sup>2</sup> 2 Wash. R. P. 597; 1 *Dembitz on Land Titles*, § 60; *Mass. Statutes* (1891), ch. 350; *McLoud v. Mackie*, 175 Mass. 355.

<sup>3</sup> *Bouvier v. Balt., etc. R. R.*, 47 Atl. Rep. 772 (N. J.).

There are two grounds upon which rights of entry for condition broken and rights of entry upon disseisin are unassignable. The chief ground is the great practical ground of the hostility of the common law to maintenance. It was maintenance to buy up a title to land from one not in possession of the land. The policy of the common law was thus to protect the weak against the strong, to prevent rich men from ousting poor men from their lands by buying up a pretended right from one who had not the possession of the land, and this policy was so fully in force that it was wholly immaterial whether the title purchased was a genuine or pretended one.<sup>1</sup> The second ground upon which these rights are unassignable is that already sufficiently indicated, that they are not vested in possession. They are like the executory devise, as already pointed out, unassignable as not vested in possession.

An equitable easement may be defined as a right in another's land in the nature of an easement, which right is created by a court of equity and is there enforceable, but, like any other property right, it is recognizable at law as well. The most common form of the equitable easement is this: A man owns a tract of land; he divides it up into lots; he puts into each deed of the different lots a provision in some way restraining the use of the land. This provision may be in the form of a condition subsequent, or a covenant, or a mere restriction, or a reservation, or an exception.<sup>2</sup> Whether the provision shall create an equitable easement is determined from the nature of the whole transaction. Very often the deed indicates it pretty distinctly; more often the indication is furnished by reference in the deed to a plan of the tract which will show the land as divided up into lots. Now, if there be a general scheme or plan on the grantor's part to create a burden or restriction upon every lot for the benefit of every other lot, every lot

<sup>1</sup> Note to the *Duchess of Kingston's Case*, *supra*; *Rice v. Boston & Worcester R. R.*, 12 Allen, 142; Co. Litt. 214 a; Bacon's Abridgment, titles "Assignment A" and "Grant D."

<sup>2</sup> *Whitney v. Union R. R. Co.*, 11 Gray, 365.



becomes charged with an easement in equity in favor of every other lot; but it must appear to the court from the nature of the whole transaction that there was this general system intended.<sup>1</sup> Here, then, is a case in which a provision expressed in terms of strict condition subsequent may be availed of in equity by other persons than the grantor and his heirs.

*Clapp v. Wilder*<sup>2</sup> is a case in which a man conveyed a lot of

<sup>1</sup> *Parker v. Nightingale*, 6 Allen, 341; *Badger v. Boardman*, 16 Gray, 559; *Jewell v. Lee*, 14 Allen, 150; *Sharp v. Ropes*, 110 Mass. 381; *Seabury v. Metropolitan R. R.*, 115 Mass. 53; *Lowell Inst. v. Lowell*, 153 Mass. 530; *Dana v. Wentworth*, 111 Mass. 291; *Beals v. Case*, 138 Mass. 138; *Hano v. Bigelow*, 155 Mass. 341; *Tobey v. Moore*, 130 Mass. 448; *Hopkins v. Smith*, 162 Mass. 444; *Ayling v. Kramer*, 133 Mass. 13; *Atty.-Gen. v. Williams*, 140 Mass. 329; *Skinner v. Shepard*, 130 Mass. 180; *Crocker's Notes on Common Forms* (3d ed.), 87, 88; *Whitney v. Union R. R. Co.*, 11 Gray, 365; *Safe Deposit Co. v. Flaherty*, 46 Atl. Rep. 1009 (Md.); *Knight v. Simmonds* (1896), 2 Ch. 294, on appeal; and see same case (1896), 1 Ch. 653; *Davis v. Leicester* (1894), 2 Ch. 208; *Tucker v. Vowles* (1893), 1 Ch. 195; *In re Birmingham, etc. Co.* (1893), 1 Ch. 342; *Everett v. Remington* (1892), 3 Ch. 148; *Mackenzie v. Childers*, 43 Ch. Div. 265; *Spicer v. Martin*, 14 App. Cas. 24; *In re Contract, Fowcett et al.*, 42 Ch. Div. 155; *King v. Dickerson*, 40 Ch. Div. 599, 600; *Collins v. Castle*, 36 Ch. Div. 243; *Holford v. Acton, etc. Council* (1898), 2 Ch. 240; *Skillman v. Smathehurst*, 40 Atl. Rep. 855 (N. J.); *Hamlen v. Keith*, 171 Mass. 77; *Roberts v. Scull*, 43 Atl. Rep. 583 (N. J. Ch.); *Trout v. Lucas*, 35 Atl. Rep. 153 (N. J. Ch.); *Cornish v. Wiessman*, 35 Atl. Rep. 403 (N. J. Ch.); *Eq. Life Co. v. Brennen*, 43 N. E. Rep. 173 (N. Y.); *Clark v. McGee*, 42 N. E. Rep. 965 (Ill.); *Peabody Co. v. Willson*, 32 Atl. Rep. 386 (Md.); *Hills v. Metzenroth*, 173 Mass. 423; *Summers v. Beeler*, 45 Atl. Rep. 19 (Md.); *McGuire v. Caskey*, 57 N. E. Rep. 53 (Ohio); *Ewertsen v. Gerstenberg*, 57 N. E. Rep. 1051 (Ill.); *Bacon v. Sandberg*, 179 Mass. 396.

A court of equity will not enforce an equitable restriction, when the changed condition of the locality would make it inequitable to do so; as, where the purpose of the restriction was to make the locality a suitable one for residences, and the general growth of the city involving the use of the neighborhood for business has destroyed the residential character of the locality. *Jackson v. Stevenson*, 156 Mass. 496; *Knight v. Simmonds* (1896), 2 Ch. 294; *Ewertsen v. Gerstenberg*, 57 N. E. Rep. 1051 (Ill.).

<sup>2</sup> *Clapp v. Wilder*, 176 Mass. 332.

A provision in a deed against erecting buildings of a certain description, etc., will not be regarded as for the benefit of the grantor's other land, which is situated on the opposite side of the street. *Locke v. Hale*, 165 Mass. 20.

land and retained the adjoining lot. He put into the deed a provision in language of strict condition subsequent that no building should be erected upon the granted land within a certain distance from the street. The retained land was later conveyed, and the purchaser brought this bill in equity against the owner of the granted land to restrain him from erecting a building nearer the street than the prescribed distance. In other words, the plaintiff claimed that the provision was not to be held a condition subsequent, but as creating an easement in the granted land in favor of the retained land. The court held otherwise, and held that the burden of proof was upon the plaintiff to show that this was what the transaction really amounted to, and that he had failed in sustaining the burden; and this failure was emphasized by the fact that the grantor was an invalid, and was in the habit of sitting at a window which looked out over the vacant lot; this, of course, tending to show that he created this restriction with no intention of binding the granted land to the retained land, and, of course, the breach of the condition subsequent could only be taken advantage of by himself and his heirs.

Sometimes it is uncertain whether in a deed the words of a provision amount to a condition subsequent, or whether they constitute a covenant, and, when thus equivocal, the courts incline to the construction of a covenant, because conditions subsequent are so harsh in their operation;<sup>1</sup> and, in a very late New York case a strict condition subsequent in a deed was held in a suit in equity not to operate as such, but to operate as a covenant running with the land. This is the case of *Post v. Weil*,<sup>2</sup> in which a man conveyed a lot of land and retained

<sup>1</sup> *Rawson v. School District*, 7 Allen, 128; *Ayer v. Emery*, 14 Allen, 67; *Scovill v. McMahon*, 36 Am. State Rep. 353, 357, 358, note; *Faith v. Bowles*, 37 Atl. Rep. 711 (Md.); *Pawtuxet Soc. v. Johnson*, 40 Atl. Rep. 417 (R. I.); *Ecroyd v. Coggeshall*, 41 Atl. Rep. 260 (R. I.); *Kilpatrick v. Mayor*, 31 Atl. Rep. 806 (Md.).

And so held in the case of a will; *Cunningham v. Parker*, 40 N. E. Rep. 635 (N. Y.).

<sup>2</sup> *Post v. Weil*, 115 N. Y. 361.

an adjoining lot. The provision was that no tavern should be erected upon the granted land. This provision was held to be a covenant running with the land, which bound the granted land in favor of the retained land, so that any owner of the retained land could insist upon the performance of the obligation not to erect a tavern. In other words, the provision created an easement in the granted land as the servient estate in favor of the retained land as the dominant estate, and, as both lots had come into one ownership, the easement was extinguished. This case is certainly in contrast to *Clapp v. Wilder*, above.

A court of equity, although recognizing a condition subsequent as a condition subsequent, — for example, as an illustrative case, *Clapp v. Wilder*, above, — never enforces a forfeiture. It is a court of law to which the party looks to get his land for breach of a condition subsequent, and frequently when equity moves it is to relieve against the enforcement of the strict condition resulting in forfeiture,<sup>1</sup> and, indeed, there are some cases, even at law, in which the courts have declined to enforce a forfeiture when the breach arose from some trivial mistake;<sup>2</sup> still, it would be very dangerous to fail to comply quite strictly with the terms of a condition subsequent.

There is a large class of late cases in which courts of equity have held language of strict condition subsequent not to constitute a condition, but to constitute a restriction merely, or to create a trust, which the owner of the land from time to time can be compelled to perform.<sup>3</sup> In such

<sup>1</sup> 4 Kent's Com. 130; 2 Story's Eq. Jur. § 1319; *Horsburg v. Baker*, 1 Pet. 232; *Livingston v. Tomkins*, 4 John. Ch. 431; *Bird v. Hawkins*, 42 Atl. Rep. 588 (N. J. Ch.). And forfeiture for even a wilful failure to pay rent promptly may be relieved against in equity. *Lundin v. Schoeffel*, 167 Mass. 469.

<sup>2</sup> Crocker's Notes on Common Forms (3d ed.), 249; *Rose v. Hawley, et al.*, 36 N. E. Rep. 335 (N. Y.); *Barrow v. Isaacs* (1891), 1 Q. B. 417.

<sup>3</sup> *Stanley v. Colt*, 5 Wallace, 119; 2 Jarman on Wills (5th Am. ed.) 5, note 1; *Brownell v. Old Colony R. R.*, 164 Mass. 34; *Faith v. Bowles*, 837 Atl. Rep. 711 (Md.); *Ashland v. Greiner*, 50 N. E. Rep. 99 (Ohio);

cases as those of the equitable easement, explained above, and in such cases as *Post v. Weil*, above, there are at least two lots of land and one of the lots is charged with a burden, and the other receives a benefit, or all of the lots are reciprocally charged with a burden and receive a corresponding benefit; but in cases of the class last mentioned, in which a trust is created, it is not necessary that there should be more than one lot and that would be the granted land.

But, notwithstanding the disposition of courts of equity in modern times to treat conditions subsequent as trusts or restrictions, and, notwithstanding the harshness of conditions subsequent, the day of conditions subsequent has not gone by, and a very good evidence of this is the case of *Clapp v. Wilder*, above stated. In some of these late cases, in which the provision was held to be a condition subsequent which involves the right of forfeiture in the event of a breach, there is no clause of forfeiture, known technically as a clause of entry and re-entry,<sup>1</sup> and in some of these late cases there is a clause of forfeiture.<sup>2</sup>

Although rights of entry for condition broken are unassignable, as above shown, yet, under the latitude of the Massachusetts statute governing devises, they are held devisable, and will pass under a residuary clause in a will.<sup>3</sup> On the contrary, in New York it has been recently held that their statute of wills is not to be so interpreted as to make a con-

*Ecroyd v. Coggeshall*, 41 Atl. Rep. 260 (R. I.); *Bird v. Hawkins*, 42 Atl. Rep. 588 (N. J. Ch.); *Mills v. Davison*, 35 Atl. Rep. 1072 (N. J.); *Mutual Ins. Co. v. Rector*, 32 Atl. Rep. 691 (N. J. Ch.); *Bennett v. Baltimore Soc.*, 45 Atl. Rep. 888 (Md.); *Rolfe v. Lefebvre*, 45 Atl. Rep. 1088 (N. H.).

<sup>1</sup> *Langley v. Chapin*, 134 Mass. 82; *May v. Boston*, 158 Mass. 23, 27, 28, 31; *Upington v. Corrigan*, 45 N. E. Rep. 359 (N. Y.); *Clapp v. Wilder*, 176 Mass. 332.

<sup>2</sup> *Cowell v. Colo. Springs Co.*, 100 U. S. 55; *Bouvier v. Balt., etc. R. R.*, 47 Atl. Rep. 772 (N. J.); *Howe v. Lowell*, 171 Mass. 575.

<sup>3</sup> *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Brattle Sq. Church v. Grant*, 3 Gray, 160, 161; *Crocker's Notes on Common Forms* (3d ed.), 85, 422.

dition subsequent devisable.<sup>1</sup> *Pemberton v. Barnes*<sup>2</sup> is a case in which it was held that a possibility of reverter expectant upon a fee simple conditional in a copyhold estate, there being no custom of the manor to entail, is devisable under the latitude of the modern English Wills Act. Here is a very good illustration of the close connection between the principles of property law, for this English case, relating to a fee simple conditional in a copyhold estate, has an important bearing upon the question of the operation of modern statutes in this country as to what interests can be devised and what cannot be devised.

Rights of entry for condition broken are sometimes called possibilities of reverter.<sup>3</sup> But there are cases in which the courts have said that they are not possibilities of reverter, but speak of them as choses in action.<sup>4</sup> In our opinion they are not possibilities of reverter, although they certainly seem to resemble them in some respects, but are to be classed with other rights of entry. That they are to be classed with other rights of entry, and not with possibilities of reverter, appears for at least two reasons. First, they are not perfected until an entry under them has been made. The person entitled to enter for breach has got a bare unassignable right, which is just what he had before breach, and to perfect his title, to complete his property right, he must enter. But, assuming in all these cases that there is nobody in possession of the land claiming to hold adversely, no entry is required to perfect the right of one having a possibility of reverter. This is best

<sup>1</sup> *Upington v. Corrigan*, 45 N. E. Rep. 359 (N. Y.). Compare *Van Rensselaer v. Ball*, 19 N. Y. 103-106.

<sup>2</sup> *Pemberton v. Barnes*, (1899), 1 Ch. 544.

<sup>3</sup> *Brattle Square Church v. Grant*, 3 Gray, 147, 148, 159, 160; *Upington v. Corrigan*, 15 N. E. Rep. 361 (N. Y.); *First Universalist Soc. of No. Adams v. Boland*, 155 Mass. 171; *Challis*, R. P. 63 *et seq.*; *Shepard's Touchstone* (by Preston), 120; *Guild v. Richards*, 16 Gray, 317.

<sup>4</sup> *De Peyster v. Michael*, 6 N. Y. 506, 507, 508; *Nicoll v. N. Y. & Erie R. R.* 12 N. Y. 139, but see page 132; *Van Rensselaer v. Ball*, 19 N. Y. 103-106 (cited in *Tiedeman*, R. P. § 277).

illustrated by the case of a fee upon special or collateral limitation, so that when the fee ceases to exist upon the happening of the contingent event the right of the owner of the possibility of reverter is complete without an entry, assuming, as said above, that there is nobody in possession claiming to hold adversely; and so with any other case of a possibility of reverter where there is nobody in possession claiming to hold adversely. This elementary truth is pointed out in *First Universalist Society of North Adams v. Boland*.<sup>1</sup>

Our next reason for excluding rights of entry for condition broken from the class of possibilities of reverter, is that we have no reason to think that they are extinguished by an assignment of them. It is true that they are unassignable, as shown in an early chapter, but we have never seen anything to indicate that an attempted assignment would extinguish them; whereas, as above shown, rights of entry of every sort are extinguished by an attempt to assign them. Without reference to the Statute 32 Henry VIII., chapter 34, which changed the common law, if there were a lease for life with a reservation of rent and a condition subsequent incorporated into the deed, exposing the life estate to be forfeited for non-payment of rent, and, if the reversioner were to assign his reversion, of course the future rent would pass as an incident of the reversion, that is, all rent which should thereafter accrue, but the right to enter for condition broken was extinguished by the assignment.<sup>2</sup> The assignee of the reversion, however, could sue the tenant for life in the action of debt, and that, too, even if there were no covenant therefor in the deed. The assignee of the reversion could also distrain for the rent.<sup>3</sup> The remedy by distress exists in some states, but not in Massachusetts. The Statute of 32 Henry VIII., chapter 34, made the condition subsequent to be assignable with

<sup>1</sup> *First Univ. Soc. of No. Adams v. Boland*, 155 Mass. 171.

<sup>2</sup> *Litt.* § 347; *Co. Litt.* 214 a, b.

<sup>3</sup> 1 *Saunders' Rep.* 240 (*Williams' notes*); *Patten v. Deshon*, 1 *Gray*, 326, 327.

the reversion, both when the particular estate is an estate for life and when it is an estate for years, and this is undoubtedly the law throughout the United States to-day. But the statute does not apply when the particular estate is an estate tail.<sup>1</sup> Suppose, on the other hand, that there be a lease for life with a reservation of rent, and that the estate be upon special or collateral limitation to endure so long as the rent shall be paid, and that the reversion be assigned, and that the rent thereafter be in arrear, the right to have the estate cease upon non-payment of rent passes with the reversion. In the case of the condition subsequent, the right to have the estate cease is not a reversionary right, and is extinguished by an assignment of the reversion. In the case of the estate upon limitation the right to have the estate cease is a reversionary right, is not extinguished by an assignment of the reversion, and passes with it.<sup>2</sup> We argue from this that a possibility of reverter expectant upon a fee upon special or collateral limitation is not to be classed with rights of entry for condition broken, and that, while unassignable, it being a true reversionary right, it would not be extinguished should its owner attempt to assign it.

The Massachusetts statute of 1887<sup>3</sup> provides that conditions and restrictions unlimited as to time shall be limited to thirty years from the date of the deed or the probate of the will. Deeds to charitable and other similar institutions are excepted, and deeds from the Commonwealth; and the statute provides that it shall not apply to existing conditions and restrictions. This is not a statute of perpetuities, because it does not declare conditions and restrictions unlimited as to time void, but simply limits them to a fixed time.

It is the uniform rule in the United States that rights of

<sup>1</sup> Co. Litt. 215 a ; Sheppard's Touchstone (by Preston), 151 ; 1 Wash. R. P. 451, note 5 ; 2 Wash. R. P. 13 ; 4 Kent's Com. 123.

<sup>2</sup> Litt. § 347 ; Co. Litt. 214 a, b ; Sheppard's Touchstone (by Preston), 150, 151.

<sup>3</sup> Massachusetts Statute of 1887, ch. 418.

entry for condition broken are never within the rule against perpetuities,<sup>1</sup> and the same principle has been applied in *First Universalist Society of North Adams v. Boland*,<sup>2</sup> to possibilities of reverter.

It is argued by Professor Gray in his work on Perpetuities<sup>3</sup> that in England a condition subsequent, when taken to import a condition subsequent, is within the rule against perpetuities; but Mr. Challis, in his work on Real Property,<sup>4</sup> denies this proposition as applicable to a condition subsequent annexed to a conveyance of the fee; for, he says, it would require an act of Parliament to make a condition subsequent annexed to a fee void as too remote. The reason is because conditions subsequent have been recognized as common law rights from the earliest times, and the rule against perpetuities, itself a rule of the common law, is a modern rule. But in *In re Hollis Hospital*<sup>5</sup> it is held, discussing Mr. Challis' proposition, and disagreeing with it, that a condition subsequent unlimited as to time and annexed to a conveyance of the fee is within the rule against perpetuities and is void. It is strange, considering how common these rights are, that no decision completely covering the ground was made in England until 1899.

Bigelow, J., in *Brattle Square Church v. Grant*<sup>6</sup> argues that a condition subsequent is vested and is not obnoxious to the rule against perpetuities because, he says, it can be at any time released; to which Professor Gray replies in his work on Perpetuities<sup>7</sup> that it is no test of the application of the rule

<sup>1</sup> Gray on Perp. §§ 282, 299, 304 *et seq.*, 321, 563; Gray on Restraints on Alienation, §§ 42 note 1, 51, 103.

<sup>2</sup> *First Univ. Soc. of No. Adams v. Boland*, 155 Mass. 171.

<sup>3</sup> Gray on Perp. §§ 282, 299, 304 *et seq.*, 321, 563; Gray on Restraints on Alienation, §§ 42 note 1, 51, 103.

<sup>4</sup> Challis, R. P. 152-154, 206, 207.

<sup>5</sup> *In re Hollis Hospital* (1899), 2 Ch. 540.

<sup>6</sup> *Brattle Sq. Church v. Grant*, 3 Gray, 148; Gray on Perp. § 305 (cl. 2). See further, *Winsor v. Mills*, 157 Mass. 365, 366; *Whitney v. Union R. R. Co.*, 11 Gray, 366.

<sup>7</sup> Gray on Perp. § 305 (cl. 2).



against perpetuities that an interest may be released, and further that the executory devise, which in that case was held to be void as too remote, could itself be released, and this brings us to the question, who can release? This subject is discussed by the author in an article in the *American Law Review*,<sup>1</sup> entitled "The Power of an Heir over an Executory Devise and over a Condition Subsequent." Now, in a former chapter we showed what the powers of alienation of an executory devise are by the executory devisee himself, and now we inquire what power has the heir, and the article, above mentioned distinguishes between an executory devise limited to the heirs of A, and an executory devise limited to A and his heirs. This last form is the form of *Brattle Square Church v. Grant*, for the executory devise there was to John Hancock and his heirs. The only trouble with the question is in those jurisdictions in which the old law still obtains, under which, in the devise to A and his heirs, the heirs are to be ascertained when the executory devise shall take effect in possession, and we argue in that article that by the better view, even in those jurisdictions, the heir of A for the time being has the same power of alienation over the property which A would have had himself, had he continued to live, and the same argument applies to a condition subsequent which is descendible. A portion of the above mentioned article by the author we introduce as a note at the end of this chapter.

## NOTE.

## THE POWER OF AN HEIR OVER AN EXECUTORY DEVISE, AND OVER A CONDITION SUBSEQUENT.

In the well-known case of the *Proprietors of the Church in Brattle Square v. Grant*,<sup>2</sup> Judge Bigelow says, that in the case of the grant of a fee on condition, the right existing in the grantor is "a vested right, which, by its very nature, is reserved to him, as

<sup>1</sup> 30 *Am. Law Review*, 69.<sup>2</sup> 3 *Gray*, 142.

a present existing interest;" and that this right to enter in the event of a breach of the condition, "as it does not arise and take effect upon a future uncertain or remote contingency, is not liable to the objection of violating the rule against perpetuities, in the same degree with other conditional and contingent interests in real estate of an executory character;" and that "the possibility of reverter, being a vested interest," "is capable at all times of being released to the person holding the estate on condition, or his grantee." But, adds the judge, "It is otherwise with gifts or grants of estates in fee, with limitations over upon a condition or event of an uncertain or indeterminate nature. The limitation over being executory, and depending on a condition, or an event which may never happen, passes no vested interest or estate. It is impossible to ascertain in whom the ultimate right to the estate may vest, or whether it will ever vest at all; and therefore no conveyance or mode of alienation can pass an absolute title, because it is wholly uncertain in whom the estate will vest on the happening of the event or breach of the condition upon which the ulterior gift is to take effect."<sup>1</sup>

In the above case there was a devise to the deacons of the church and their successors upon this express condition and limitation that the minister shall constantly reside in the house devised; and upon failure to comply therewith, the devise was declared to be void, and the property was given over to "John Hancock, Esquire, and to his heirs forever."

It is to be observed that while in one place Judge Bigelow speaks of the devise over as being "to the heirs of John Hancock," in three other places he speaks of the devise over as being "to John Hancock and his heirs."

Now, there is a manifest difference between a devise to the heirs of a person, and a devise to a person and his heirs. In the former case, as we shall presently see, the heirs are not necessarily ascertainable at the death of the ancestor; but the gift is to them as purchasers; whereas, in the latter case, the gift is not to the heirs at all, but it is to the ancestor himself; and the heirs take not as purchasers, because the gift is not to them, but they take by descent under their ancestor, the purchaser.

Passing by cases of such descriptions as when in a gift to heirs, the word "heirs" is construed to refer to persons now ascertain-

<sup>1</sup> Pages 148, 149. See also pages 160 and 161 of this case.

able, the ancestor now living, and as when the word "heirs" is construed to mean children, and like descriptions of cases, we will refer to the case of *Sears v. Russell*.<sup>1</sup> In that case there was an executory devise to the heirs of the testator; and it was held that they were to be ascertained when the contingent event should occur, if ever.

In *Putnam v. Story*,<sup>2</sup> there was a limitation to the heirs of a person who was living at the testator's decease; and it was held that an heir apparent could make a valid alienation which, of course, would be subject to the contingency of his surviving his ancestor. But under the strict rule of *nemo est hæres viventis*, no one can be ascertained as an heir, at least until the death of the ancestor; and it was said in effect, in that case, that no one but an heir apparent could make a valid, though, of course, contingent, alienation.

But how is it in an executory devise to A and his heirs: thus, — to John Hancock and his heirs — after the decease of the ancestor? Can or cannot the heirs make a valid, though contingent, alienation of the executory devise?

In *Winsor v. Mills*,<sup>3</sup> it is said by Judge Knowlton, commenting upon another statement contained in *Brattle Square Church v. Grant*, that in that case the executory devisee or his heirs could have released;<sup>4</sup> and this is the question we wish here to consider and more broadly, namely, whether, but for the invalidity of the executory devise on the ground of its remoteness, the heirs of John Hancock for the time being, could not have passed the entire interest under the executory devise, not merely by a release, but by a devise, or by a conveyance to a stranger.

This is an important question; because it involves the power over the alienation of an executory limitation in fee, after the death of the ancestor to whom it is limited in fee, — in a case which is free from the imperfection of remoteness.

We must, then, take up the subject of the descent of a future interest, together with that of the power of the heir for the time being, to alienate that interest.

And here it may be well to mention that at law, without the aid of statute, an executory devise, though limited to A and his heirs, cannot be assigned; but that in equity, it is assignable by A him-

<sup>1</sup> 8 Gray, 86.

<sup>2</sup> 132 Mass. 205.

<sup>3</sup> 157 Mass. 365.

<sup>4</sup> See also Gray on Perp. § 305, cl. 2.

self,—and likewise it is, even at law, devisable by him.<sup>1</sup> But even at law, such an executory devise can be released by A.<sup>2</sup> “Modern statutes have very generally made legal executory interests alienable as well as releasable.”<sup>3</sup>

Under the old law, a vested remainder limited to B and his heirs descended to the person who should prove to be the heir of B when the particular estate came to an end. The same it was, in the case of the descent of a reversion, which is also a vested interest. It descended to the person who should prove to be the heir of the first reversioner when the particular estate came to an end.<sup>4</sup>

In the case of executory interests, as contingent remainders and executory devises, the rule of descent was, that the person entitled was he who should prove to be the heir of him to whom the interest was limited in fee, whenever the contingency should happen.<sup>5</sup> Thus, in the case of vested interests, the ascertainment of the heir would be *expressed* to be as of the expiration of the particular estate; in the other case, it would be *expressed* to be, as of the happening of the contingency.

Moreover, in either case, whether contingent or vested, it might happen that before the interest became capable of immediate enjoyment in possession, the persons who successively could predicate of themselves heirship of the first purchaser or first reversioner, as the case may be, would not necessarily be the heirs of their predecessors in the line of heirship.<sup>6</sup>

An illustration of the mode of descent of an executory devise to A and his heirs is well illustrated by the case of *Goodright v. Searle*.<sup>7</sup> The devise was to the testator's son G and his heirs, but if he should die under twenty-one years of age, leaving no issue, then over to the testator's mother, P, in fee. The executory devisee, P, died after the testator, G surviving; and he was the heir of P. Thereafter G died under age and without leaving issue. It

<sup>1</sup> 2 Wash. R. P. 341, 357, 367, 368; *Roe d. Perry v. Jones*, 1 H. Black. 30; *Jones v. Perry*, 3 T. R. 88, 94; *Fearne on Rems.* 548, note (f); *Watkins on Conveyancing* (8th ed.) 217, 218; *Gray on Perp.* § 268; *Jarman on Wills* (6th ed. by Bigelow), 49.

<sup>2</sup> 2 Wash. R. P. 357, 368; *Gray on Perp.* § 268.

<sup>3</sup> *Gray on Perp.* § 268.

<sup>4</sup> *Watkins on Descents*, 24, 25, 28, 29, 41, 42, 120, 121.

<sup>5</sup> *Watkins on Descents*, 122; *Tudor's Lead. Cases* (3d ed.) 731.

<sup>6</sup> *Watkins on Descents*, 120, 121.

<sup>7</sup> 2 Wils. 29.

was held that the executory devise did not merge in the fee of G, and that the executory devise did not pass to the heir of G, who was not the heir of P, but that it took effect in the person who was the heir of P when the contingency happened, which was at the death of G under age and without issue.

Among other cases involving the principle of the executory devise passing to the heir as of the time of the happening of the contingency, there is the case of *Barnitz's Lessee v. Casey*,<sup>1</sup> by Judge Story.

Mr. Fearne,<sup>2</sup> commenting on the above case of *Goodright v. Searle*, says that the principle that the interest vests in the person who is heir upon the occurrence of the contingent event, is really the same principle as that which applies to the descent of a vested interest; for that in each case the heir is ascertained when the estate falls into possession;<sup>3</sup> and further that there could have been no merger, for that "the executory fee devised to the mother, could have no existence before the decease of the son under age without issue; for upon that event only could it arise." "Now," adds Mr. Fearne, "how was it possible for it to merge before it had any existence? If it could be extinguished by merger, it must be by its union with a greater estate out of which it was to arise, and of which it might be considered as a part or at least as an extraction. But how are two estates to unite, or one to become blended and confounded with or absorbed in the other, when both are of equal measure, viz.: both fee simples; and of which the one cannot commence or partake of existence at all, but in an event which destroys and annihilates the other?"

Now, it may be regarded as very clear, that the old law of the descent of the vested remainder and the reversion has been superseded very generally in the United States; and that the descent is the same as that which generally prevails in this country in the case of the descent of an estate in possession.<sup>4</sup>

Moreover, and it must necessarily follow, that each heir in succession, regardless of whether he be the heir of the original vested remainderman to whom the estate was limited in fee simple or of

<sup>1</sup> 7 Cranch, 456; 2 Shars. & Budd's Am. Lead. Cas. R. P. 521, 522.

<sup>2</sup> Fearne on Rems. 561, 562.

<sup>3</sup> See also *Barnitz's Lessee v. Casey*, 7 Cranch, 470.

<sup>4</sup> *Winslow v. Goodwin*, 7 Met. 383; *Cook v. Hammond*, 4 Mason, 467;

4 Kent's Com. 388, 389; 2 Wash. R. P. 391, 392, 410; 3 Shars. & Budd's Am. Lead. Cas. R. P. 408, 409; *Miller v. Miller*, 10 Met. 393.

the original reversioner, can alien the remainder or the reversion, and pass the title to it.

And even under the old law of the descent of the vested remainder and of the reversion, limited to one in fee simple, the heir for the time being, that is, the intermediate heir, could pass full title to the interest; and it could likewise be taken for his debts.<sup>1</sup>

In *Adams v. Chaplin*,<sup>2</sup> Chancellor Harper says by way of *dictum*:<sup>3</sup> "It was never doubted, I imagine, if a person grants an estate tail, with reversion to himself, and dies, his heir at law may grant or release the reversion; and so any intermediate heir, if there should be any before the termination of the estate tail."

In *Bishop v. Fountaine*,<sup>4</sup> there was a devise of land to a trustee, in trust to convey to the children, if any, of Mary, and "for want of such issue, or if such issue die without issue," to convey to the eldest son of testator's nephew John and his heirs; but that if the latter claim anything during the life of Mary, or of any of her issue, then both the nephew John and his eldest son to be excluded from having anything out of the estate. John had an elder son, Anthony, and two daughters. It does not appear whether Anthony was born at the time of the testator's death. Anthony died and left issue, a son named John, who was the heir of Anthony; and this latter John in the lifetime of Mary, devised the land to the plaintiff, and died without issue. Thereafter, Mary died without issue. The heir of the trustee conveyed the land to the said sisters of Anthony, who, it is stated, were the heirs of Anthony, and of his father, John. It was held that the deviser, John, the grandson of John the elder, and the son of Anthony, had "no estate devisable, but a mere possibility during the life of Mary or any of her issue;" and that the conveyance to the sisters of Anthony, also stated to be "the heirs of Anthony," was right. Although not stated, yet it must follow that these sisters of Anthony were also the heirs of John the younger. Here, then, was a devise by an heir (the ancestor being dead) of a devisee of a contingent in-

<sup>1</sup> 2 Wash. R. P. 391, 410; *Miller v. Miller*, 10 Met. 400; *Cook v. Hammond*, 4 Mason, 485, 494, 495; *Vanderheyden v. Crandall*, 2 Denio, 25, s. c. 1 N. Y. 491; *Ingilby v. Amcotts*, 21 Beav. 592. See further, *Drake v. Lawrence*, 26 Supreme Ct. Rep. (N. Y.) (19 Hun) 112.

<sup>2</sup> 1 Hill's Ch. (S. C.) 265.

<sup>3</sup> On page 273.

<sup>4</sup> 3 Levinz, 427.

terest while the devise still remained executory, or of an heir of a so-called equitable remainderman, and it was held to be void. No reasons are given by the court.

In commenting on this case, in *Jones v. Perry*,<sup>1</sup> Grose, J., says that the only way of accounting for the decision is, — because of the clause that claiming anything during the life of Mary, etc., was to exclude from the enjoyment of the estate, and that perhaps the estate might be considered as “contingent until that condition was performed which could not be till the death of Mary without issue;” and Grose, J., adds: “He would rather have take (*sic*) an equitable remainder in fee, expectant on the death of Mary, and the failure of issue of her body, which would have been a vested estate, and consequently devisable.”

Grose, J., further adds: “The only way in which I can account for this doctrine having been afterwards adopted by Lord Chief Justice Parker, and by Lord Hardwicke, was because they considered it as a point already determined, and therefore did not enter into the reasons on which it could be supported;” and he says, “Now, if the case in *Levinz* cannot be considered as law, the foundation on which the other cases were built, is destroyed;” and that “the modern cases have decided the other way.” But in *Jones v. Perry*, the devise was not by an heir.

Mr. Fearne,<sup>2</sup> speaking of *Bishop v. Fountaine*, says: “Contingent estates appear formerly to have been held not devisable by the person entitled thereto, whilst they remained contingent, as in the case of *Bishop v. Fountaine*.”<sup>3</sup> And he says: The reasons upon which the estate was held a mere possibility during the life of Mary or of any of her issue, are not stated or mentioned; but that probably it was because of the clause excluding John from claiming anything out of the estate during the lifetime of Mary or of any of her issue; and that “unless we recur to some reason of this nature for suspending the effect of the devise to” Anthony, “in that case it should seem that he would have taken the equitable remainder in fee expectant on the decease of” Mary “and the failure of the issue of her body; which would have been a vested estate, and clearly devisable.”

It should be remembered that Mr. Fearne has declared that in

<sup>1</sup> 3 T. R. 97 (A. D. 1789).

<sup>2</sup> Fearne on Rems. 366, 367.

<sup>3</sup> 3 Levinz, 427.

the case of an executory devise, limited to one and his heirs, descending, there could be no merger with the preceding fee because the executory interest while it remained executory could have no existence.

If the testator's son in *Goodright v. Searle* had been the tenant for life of a particular estate, and the limitation over had been a vested remainder, it seems that upon the decease of the ancestor, the remainderman, the estate for life would have merged in the fee simple in remainder, thus producing a fee simple in possession.

Moreover, whatever difficulty there may be in establishing an alienable interest in an intermediate heir of an executory devisee, is enhanced by the contingency, which would frequently arise, that the ultimate heir might not be the heir at all of the intermediate heir.

In *Winslow v. Goodwin*, there is a very forcible expression of the law by Judge Wilde; but the question as to the power of alienation of an intermediate heir did not arise in that case; nor did the question come up as to when the heir or next of kin of a person is to be ascertained.

In *Winslow v. Goodwin*,<sup>1</sup> it is said by Judge Wilde, delivering the opinion of the court: "In the case of *Cook v. Hammond*,<sup>2</sup> it was decided after a very able discussion of the question as to the construction of the first provision in the Stat. of 1805, ch. 90, that remainders and reversions vested by descent in a person who may die intestate, descended to his heirs in the same manner as estates in possession." Judge Wilde added: "No question was raised in that case, as to contingent remainders and executory devises. But the statute makes no distinction between vested and contingent remainders; and there seems to be no reason for any such distinction, especially as no distinction in the law existed before the statute. The language of the statute is unambiguous. If an intestate is entitled to any interest in real or personal estate, vested or contingent, it will pass by force of the statute to his heirs or administrator, in the same manner as estates in possession."

In *Doe v. Roe*,<sup>3</sup> the facts were: a devise to A with a contingent devise over to B. While still contingent, B died, leaving two children who were her heirs. These died successively without issue; and their father was their heir; although he was not the

<sup>1</sup> 7 Met., on p. 383.

<sup>2</sup> 4 Mason, 467.

<sup>3</sup> 2 Harr. (Del.) 103, referred to in 2 Shars. & Budd, 522.



heir of his wife B. When the contingency happened and the contingent estate took effect in possession, this husband of B was living, but his wife and children had all died, as above. Held that under the statutes of Delaware, the husband was entitled as the heir of that child of his which last died. In this case, no question arose as to any alienation of any kind by anybody.

In *Moore v. Rake*<sup>1</sup> the judges lay stress upon the fact that it was a vested remainder in fee simple which was descending; and that a conveyance by an intermediate heir of the vested remainderman passed the interest as against his own heir, that is, the heir's heir. This was a vested remainder subject to an estate tail. But, argues one of the judges, the same result would follow, if the remainder be regarded as a contingent remainder, or if it were an executory devise.

And to this last proposition he cites<sup>2</sup> certain authorities. But none of these authorities sustain this position.

However, the old doctrine of the descent of contingent interests is asserted in *Payne v. Rosser*.<sup>3</sup> It was in this case held that the heirs of an executory devisee are to be ascertained upon the happening of the contingency. But no question arose in this case as to any alienation by anybody.

The following Maryland case is exactly to the point. It is the case of *Buck v. Lantz*.<sup>4</sup> A deed of trust of real and personal property was made in favor of the grantor for life, remainder to her daughter Margaret Buck for life, remainder to such child or children of Margaret's as she might leave living at the time of her death; but if she should die without leaving lawful issue living at the time of her death, then in trust to convey the whole remainder to Mary Harwood, sister of the grantor, absolutely. The grantor first died; then Mary Harwood died; and thereafter Margaret died, unmarried and without issue, but leaving a will in which she devised and bequeathed all the property to which she might be entitled at the time of her death, to her aunt, Cassandra Olivia Buck. The question was whether the heirs of Mary Harwood were entitled or whether Cassandra Olivia Buck was entitled, — the latter as devisee of Margaret. The court said: <sup>5</sup> "The next question is, who are the heirs of Mary Harwood

<sup>1</sup> 26 New Jersey L. 574.

<sup>2</sup> Page 594.

<sup>3</sup> 53 Georgia, 662, 664 (A. D. 1875).

<sup>4</sup> 49 Md. 439 (A. D. 1878).

<sup>5</sup> Page 445.

who are now entitled to the estate? It is clear that those only can take who were *in esse* at the time when the contingency happened, and the estate fell into possession. That did not occur until after the death of Margaret Buck. She could not, therefore, be heir, or take or transmit any interest in the estate by will or otherwise." The court quotes the language of the court in *Barnitz's Lessee v. Casey*<sup>1</sup> as follows: "The rule that the heir in such case is ascertained when the contingency happens 'is adopted in analogy to that rule of descent which requires that a person who claims a fee simple by descent from one who was first purchaser of the reversion or remainder expectant on a freehold estate, must make himself heir of such purchaser at the time when that reversion or remainder falls into possession.'" The foregoing is the only authority to this point cited by the court in *Buck v. Lantz*. But see *Snively v. Beavans*,<sup>2</sup> where, however, the question of alienation by an heir did not arise.<sup>3</sup>

In *Deas v. Horry*,<sup>4</sup> it was held that the possibility of reverter, subject to a fee simple conditional, descended to the person who should be the heir of the original grantor or testator at the time that the fee simple conditional should expire; that is, that the heir was to be ascertained at that time.

There was no question here as to the power of an intermediate heir to alien.

The court says by way of *dictum*,<sup>5</sup> that a right of entry is descendible in the same way that the above possibility of reverter is descendible; meaning, it is supposed, that this would apply in South Carolina to a reversioner's right of entry. The court is here speaking of the right of entry which a reversioner had upon the levying of a fine by the tenant for life of the particular estate. This was a ground of forfeiture of the particular estate. The court here cites *Goodright v. Forrester*.<sup>6</sup>

The Statute De Donis has never been the law of South Carolina;

<sup>1</sup> 7 Cranch, on p. 470.

<sup>2</sup> 1 Md., on p. 225.

<sup>3</sup> See further, as to Maryland, *Chirac v. Reinecker*, 2 Pet. 625; cited in 2 Wash. R. P. 410, note. See further, *Conner, Executrix, v. Waring et al.*, 52 Md. 724.

<sup>4</sup> 2 Hill's Ch. (S. C.) 244 (A. D. 1835), cited in 4 Kent's Com. 511, note (c).

<sup>5</sup> Page 249.

<sup>6</sup> 8 East, 564; 1 Taunt. 578.

so that what would be an estate tail wherever the estate tail exists, is in South Carolina the ancient fee simple conditional at the common law; to which a possibility of reverter is subject. The right which a grantor has upon limiting an estate tail is a reversion; and a reversion is a vested right.

In *Pearse v. Killian*,<sup>1</sup> it was held that the heir of the donor of a fee simple conditional is to be ascertained at the expiration of the fee simple conditional; and it is said that before the expiration thereof there is no power in the heir to convey nor to devise, yet that he may release to the tenant in fee simple conditional.<sup>2</sup>

In *Adams v. Chaplin*,<sup>3</sup> it is said: Our act of distributions has so altered the English law that it is not required that one who claims a reversion or a remainder by descent should be ascertained at the expiration of the particular estate; but that a right of reverter subject to a fee simple conditional is not an estate in the land, but a mere possibility; and that this is not affected by the act of distributions.<sup>4</sup>

In *Hicks v. Pegues*,<sup>5</sup> and in *Buist v. Dawes*,<sup>6</sup> it was held that in an executory devise to one and his heirs, the heirs are ascertained upon the death of the ancestor, and not upon the happening of the contingency; and that the common law had been altered in this respect in South Carolina by the statute of 1791. And the court, in this latter case, goes so far as to say that it is conceded that the ancestor "might have devised his interests now under consideration; which is very near equal to admitting that, in default of a will on his part, those interests descended, immediately upon his death, to such distributees as he then left."<sup>7</sup>

In England, the statute of 1 Vict.<sup>8</sup> provides that it shall be lawful for every person to devise, bequeath, or dispose of by his will all real and personal estate which he shall be entitled to either at law or in equity; and that the power hereby given shall extend to "all contingent, executory, or other future interests in any real or

<sup>1</sup> *McMullan's Eq. (S. C.)* 231 (A. D. 1841).

<sup>2</sup> See further, 1 *Preston on Estates*, 440, 441. See also *Adams v. Chaplin*, 1 *Hill's Ch. (S. C.)* 271, 272 (A. D. 1833).

<sup>3</sup> 1 *Hill's Ch. (S. C.)* p. 269.

<sup>4</sup> And see pp. 277, 278, 279.

<sup>5</sup> 4 *Richardson's Eq. (S. C.)* 413.

<sup>6</sup> 4 *Richardson's Eq. (S. C.)* 415, note (A. D. 1852).

<sup>7</sup> In order to save space we here omit a portion of this article.

<sup>8</sup> Ch. 26, § 3.

personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested;” “and also to all rights of entry for conditions broken and other rights of entry.”

And the statute of 8 & 9 Vict.<sup>1</sup> provides that “a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed.”<sup>2</sup>

In *Culley v. Doe d. Taylerson*,<sup>3</sup> it was decided that if a tenant in common of land, whose co-tenant is in the actual possession, but not as a disseisor, dies, and his heir devises his interest, that devise carries the interest as against that heir's heir; and that this would be true even though there were an ouster by the tenant in common in actual possession, if the same did not amount to a disseisin;<sup>4</sup> and that this devise is good without the help of the Stat. of Vict. ch. 26.

Preston says, but citing no authority, that in the case of a contingent remainder, each heir for the time being is so far the owner that he may devise or release.<sup>5</sup>

We have yet to mention the very important case of *Ingilby v. Amcotts*.

*Ingilby v. Amcotts*,<sup>6</sup> decided by Sir John Romilly, Master of the Rolls, in A. D. 1856, is as follows: In 1795, the Kettlethorpe estates were settled upon Sir William Ingilby for life, with remainder to his first and other sons in tail male, and with remainder to his daughters in tail, and then with similar limitations to his sister Elizabeth. In default of issue by her, with similar limitations in favor of his sister Augusta. In 1808, the Harrington and another estate were devised to Augusta in fee, with an executory devise to another sister, Diana, in the event of

<sup>1</sup> Ch. 106, § 6.

<sup>2</sup> In order to save space we here omit a portion of this article.

<sup>3</sup> 11 Ad. & Ell. 1008.

<sup>4</sup> See p. 1022.

<sup>5</sup> 2 Preston's Abstr. 443. See further, 3 Preston on Conv. 496.

<sup>6</sup> 21 Beav. 585, cited in *Jarman on Wills* (6th ed. by Bigelow), 49, note (g).

Augusta's coming into actual possession of the above mentioned Kettlethorpe estates. In 1841 Diana died, and Sir William was her heir-at-law. Sir William died in 1854 without leaving any children surviving him, and thereupon Elizabeth became entitled to the Kettlethorpe estates. Elizabeth died thereafter in 1854; and thereupon Augusta came into the possession of those estates; and consequently the executory devise limited to Diana took effect. Sir William left a will dated in 1851, and the plaintiffs were the devisees under his will. The defendants were the co-heirs-at-law of Sir William and of Diana. The question was whether the estates covered by the executory devise passed under the will of Sir William. That executory devise was limited to Diana, and when it took effect Sir William had been for some time deceased, so that the then heir of Diana was not Sir William. The Master of the Rolls declared that both under the old law, and under the above statute of 1 Vict., ch. 26,<sup>1</sup> the property covered by the executory devise passed under the will of Sir William. The Master of the Rolls says<sup>2</sup> that the "rule of descent is not confined to contingent interests, for vested interests in remainder and reversion are exactly in the same situation; and yet no one ever supposed that a person who became entitled by descent to a vested interest in remainder, or to a reversion expectant upon the decease of a tenant for life, was totally unable to dispose of such interest either by deed or by will; or in other words, was unable to grant or devise it."

The Master of the Rolls also refers<sup>3</sup> to the operation of the statute of 3 & 4 William IV. ch. 106; and that thereunder if a person dies seised of an estate in possession, the descent is to the heir of the last purchaser; and yet that it could not have been intended to prevent a person who inherited an estate in fee simple in possession from selling or devising that estate; and then he adds: "and yet it is argued that as regards interests which are incapable of seisin, it has that effect, by taking away the descendible character; and it is obvious that if it takes away the descendible character in one case, it takes away the descendible character in the other case;" and that it is a descendible estate in both cases, but that the descent is traced to the heir of the purchaser, and not the heir of the person last seised, or the person last entitled, whether it be a matter capable of seisin, or a matter incapable of seisin.

<sup>1</sup> See p. 594.

<sup>2</sup> Page 592.

<sup>3</sup> Pages 593, 594.

It is to be observed<sup>1</sup> that Sir William never could have had any benefit personally of this executory devise, because it could not take effect until after his death and the failure of his issue. There is no reference in this case to *Bishop v. Fountaine*.

This case of *Ingilby v. Amcotts* leads to the conclusion that though the heir of the purchaser, to whom a contingent interest has been limited in fee, is to be ascertained at the happening of the contingency, yet that the interest is alienable by an intermediate heir, not merely by a release, but by devise, and by any appropriate conveyance *inter vivos*; and, of course, if the descent is to the heir at the death of the ancestor, in the case of a contingent interest limited to the ancestor in fee, and then to that heir's heir, the conclusion is inevitable that the contingent interest is alienable in every way by the heir for the time being. The conclusion reached in *Ingilby v. Amcotts* we regard as sound, notwithstanding certain authority above mentioned to the contrary.

Of course the heir can have no greater power than the ancestor; and when the power of the ancestor is in any way limited by the want of statutory help, as to assign at law (see above), the power of the heir must be correspondingly limited.

The conclusion reached in *Ingilby v. Amcotts* would seem to be valid, because, assuming the ancestor to have the power of alienation, why should not the heir have it also? True, he may not be entitled as of the time of the happening of the contingency, under the method of descent within which the heir is to be ascertained at that time. But in the case of a vested remainder or a reversion which is descending, the intermediate heir, under the old method of descent, may pass a good title as against one ascertainable as the heir of the first remainderman or of the original reversioner when the interest falls into possession (see above). But it may be said that we are here discussing an executory and not a vested interest. But it is, for all that, an interest which the ancestor may alien; why not his heir as well as himself?

At the beginning of this article we quoted the language of Judge Bigelow in the case of the Proprietors of the Church in *Brattle Square v. Grant*, touching rights of entry for breach of condition subsequent.

We will now quote from *Austin v. Cambridgeport Parish*,<sup>2</sup> *Hayden v. Stoughton*,<sup>3</sup> and *Brigham v. Shattuck*,<sup>4</sup> all three of

<sup>1</sup> And see p. 595.    <sup>2</sup> 21 Pick. 215.    <sup>3</sup> 5 Pick. 528.    <sup>4</sup> 10 Pick. 306.

which cases are referred to by Judge Bigelow in the above mentioned case.

In *Austin v. Cambridgeport Parish*, Judge Dewey says that the owner of the right of entry for condition broken has "a contingent possible estate;" and then he goes on to say, that "such an interest is devisable in England seems well established by the case of *Jones v. Roe*,<sup>1</sup> and the cases there cited." He adds that Chancellor Kent states the rule to be that "all contingent possible estates are devisable." He then adds that *Hayden v. Stoughton*<sup>2</sup> has given a construction "to *our statutes*" authorizing devises, etc. And in *Hayden v. Stoughton*<sup>3</sup> the court says \* that a right of entry for condition broken is a "contingent interest."

And so, in *Brigham v. Shattuck*,<sup>5</sup> the court speaks of a right of entry for condition broken as "a contingent interest."<sup>6</sup>

It certainly would seem that, apart from any statute, a right of entry for breach of condition subsequent would descend in the same mode as does a reversion or a remainder.

It is said in *Hubback on Succession*,<sup>7</sup> that before the inheritance act, a right of action or of entry would so descend.

While at the common law such right before entry is not assignable, it is yet releasable; and, under the modern law, it has been declared to be devisable.<sup>8</sup>

In *Miller v. Miller*,<sup>9</sup> the question was under what law a reversion should descend. The particular estate was a tenancy by the curtesy. The married woman, who was the owner in fee, died leaving a husband and children. At the time of her death, the law gave two portions to her eldest son. Before the death of her husband, the tenant by the curtesy, the law was changed, providing for a descent in equal shares to the children. The decision was, that the eldest son was to have two shares as under the old law. At the death of the husband, the ascertainment of the heirs resulted in this family in precisely the same individuals taking as heirs under the modern system of ascertainment, as would take under the old law governing ascertainment. The only question, therefore, was whether the eldest son could have two shares or only one share;

<sup>1</sup> 3 T. R. 88.

<sup>2</sup> 5 Pick. 528.

<sup>3</sup> 5 Pick. 528.

<sup>4</sup> On p. 539.

<sup>5</sup> 10 Pick. 306.

<sup>6</sup> See also *Sackett v. Mallory*, 1 Met. 357.

<sup>7</sup> (London, A. D. 1844) 140, 141.

<sup>8</sup> See *supra*; see also *Van Rensselaer v. Ball*, 19 N. Y. 103-106.

<sup>9</sup> 10 Met. 393.

and the court held that he was entitled to two shares, as under the law, in this respect, as it stood at his mother's death. The law was changed in 1789, taking effect in 1790, 1st of January. But Chief Justice Shaw says,<sup>1</sup> by way of *dictum*: "But even if the vesting of the estate were suspended until the happening of any event, when the event does happen the right by descent must depend upon the law, as it stood when the descent was cast. Suppose an estate was granted sixty years ago, in 1785, upon a condition subsequent, and the grantor died the following year; and now, the event happens upon which the estate, by force of the condition, is defeated, and the heirs of the grantor become entitled to enter; and the question is, who are his heirs? Would it not be those who were the heirs of the donor at the time of his decease in 1786? The benefit of the condition, the *scintilla juris*, then vested in them, viz.: the right to enter for condition broken; and whether the condition were broken before or after the change of the law 1st of January, 1790, the same persons would be heirs, constituted so by law, taking in the proportions fixed by that law when they became heirs."

Thus, Chief Justice Shaw likens the descent of a condition subsequent to the descent of a reversion; and under modern law in the United States, as above shown, the reversion descends like as an estate in possession in this country descends.<sup>2</sup>

There would seem to be no reason why an intermediate heir, to whom a right of entry for breach of condition subsequent descends, should not have the same power over it to release it and to devise it which the ancestor had himself, and upon the same principle of the power of an intermediate heir, as is above set forth concerning remainders and reversions; and that too, whether the right be regarded as vested or as contingent; for, as we have above sought to show, a contingent or an executory right is as much within the power of the intermediate heir as is a vested right. If the descent be such under statutory systems as to do away with the intermediate heir, of course *no* such question can arise.<sup>3</sup>

(Article by the author in 30 Am. Law Review, 69.)

<sup>1</sup> Pages 400, 401.

<sup>2</sup> In order to save space we here omit a portion of this article.

<sup>3</sup> See further, *Tobey v. Moore*, 130 Mass. 450.



## CHAPTER XXV.

## RESERVATIONS AND EXCEPTIONS.

A RESERVATION in a deed reserves to the grantor some newly created right. An exception excepts out from the grant something which exists in substance at the time of the grant. It is said that a privilege reserved of hawking, hunting, fishing, and fowling, is strictly neither a reservation nor an exception. It is also said that, strictly, a right of way reserved is neither a reservation nor an exception, for it is not a parcel of the thing granted, so not an exception, nor does it issue out of the thing granted, so not a reservation.<sup>1</sup> But these rights are generally by way of reservation, and so are easements generally by way of reservation, rather than by way of exception, and because they are incorporeal rights and newly created. As to rights of way, which are one species of easement, we shall presently see that they are, under certain circumstances, sometimes created by way of exception. There is no illustration of a reservation, when the thing is taken in its strictest sense, so good as that of a rent, for it does, in legal contemplation, issue out of the land,<sup>2</sup> thus, a

<sup>1</sup> *Claffin v. Boston & Albany R. R.*, 157 Mass. 492, 493; 3 *Gray's Cases on Prop.* 481, note; 2 *Leake*, 265; *Bowen v. Conner*, 6 Cush. 135; *Kennedy v. Owen*, 136 Mass. 202.

<sup>2</sup> *Martindale on Conv.* 89, 95-97; *Bean v. French*, 140 Mass. 231; *Ashcroft v. Eastern R. R.*, 126 Mass. 198; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 321, 322; *Stockwell v. Couillard*, 129 Mass. 231, 233; *Glass v. Hulburt*, 102 Mass. 31, 34, 35, 37; *Parker v. Nightingale*, 6 Allen, 346; 3 *Gray's Cases on Prop.* 481, note; 2 *Wash. R. P.* 639 *et seq.*; *Parish v. Halkyn Co.* (1895), App. Cas. 117; *Cooper v. Stuart*, 14 App. Cas. 289; *Orr v. Mitchell* (1893), App. Cas. 238; *Wellman v. Churchill*, 42 Atl. Rep. 352 (Me.); *Knowlton v. N. Y.*, etc. R. R., 44 Atl. Rep. 9 (Conn.); *Smith v. Furbish*, 44 Atl. Rep. 398 (N. H.); *Morrison v. Bank*, 33 Atl. Rep. 782, 784, 785 (Me.).

grant of land to A and his heirs, reserving a rent to the grantor. A very good illustration of an exception is a grant of land to A and his heirs excepting or reserving the woods on the land. Here the thing excepted exists in substance at the time of the grant.<sup>1</sup>

In *Stockbridge Iron Company v. Hudson Iron Company*<sup>2</sup> there was a grant of land, and the deed contained a clause giving the grantor the right to mine a certain quantity of the ore contained in the land. This was held to be a clause of reservation, and this was the more reasonable view, as the right created was an incorporeal right and was a newly created right. This case is a good one for an illustrative case.

The words "reserving" and "excepting" have very little significance in determining whether the clause shall be taken to be a clause of reservation or a clause of exception. For the court must decide from the nature of the provision.<sup>3</sup>

A reservation, being a newly created right, is in legal theory a re-grant from the grantee to the grantor, and this is true, even though the deed be a deed poll, which, of course, is only signed and executed by the grantor.<sup>4</sup> Such deeds are almost universal in the New England states.

An exception withholds from the grantee something which the grantor might have conveyed but did not, and it should never be lost sight of that both a reservation and an exception are for the benefit of the grantor.

Suppose the grantee goes into equity and taxes one of the functions of a court of equity, which is to reform a contract asking that the deed be reformed so as to correspond with the agreement of the parties, and suppose that the grantee seeks to diminish the force of the clause of exception or reservation. He will not be allowed to do this, if the clause be taken to be

<sup>1</sup> Doctor & Student, dial. 2, ch. 22; 2 Wash. R. P. 641.

<sup>2</sup> *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 321.

<sup>3</sup> *Claffin v. Boston & Albany R. R.*, 157 Mass. 493. And see the authorities in note 2, page 339, above.

<sup>4</sup> See the authorities in note 2, page 339, above.

an exception, because more will pass to him, the grantee, than the deed expresses, and this the Statute of Frauds will not permit. But, if the clause be taken to be a clause of reservation, he may diminish its force by parol evidence, and have the deed reformed, because he has now sought to have the deed give back less than it expresses, and this, of course, is not obnoxious to the Statute of Frauds.<sup>1</sup>

In Massachusetts the reservation must be to the grantor and his heirs in order to give him a fee in the right reserved, provided that the clause be taken to be a reservation. Otherwise it is a mere personal right to the grantor, for the word "heirs" is indispensable in a deed to give a fee. If, however, the clause be an exception, the word "heirs" is not necessary.<sup>2</sup> Now, suppose a farmer has a railroad come through his land, and that the company takes a deed from him of the strip between the fences, the deed reserving and excepting a right of way across the railroad for the purpose of hauling hay, etc. If he has reserved a fee there is an easement in the company's land for the benefit of the grantor's land. But, if owing to the omission of the word "heirs," he has not reserved a fee, he has only a life estate. In some cases even newly created rights in the granted land have been held to be in fee without the use of the word "heirs," and irrespective of the question of reservation or exception, in order to carry out the intention

<sup>1</sup> See the authorities in note 2, page 339, above.

Although fraud is a ground for rescission and cancellation in equity (Adams' Equity, 174 *et seq.*, *Glass v. Hulburt*, 102 Mass. 24), yet, in some cases, fraud has been the ground for reforming the instrument. Maupin on Marketable Title, pp. 536, 537. *Cook v. Liston*, 43 Atl. Rep. 389 (Penn.). But see *Glass v. Hulburt*, 102 Mass. 24, in which the fact of fraud was not allowed to effect the reformation of the deed so as to include more land than that in the deed contained, owing to the Statute of Frauds.

<sup>2</sup> *Claffin v. Boston & Albany R. R.*, 157 Mass. 493; *Dennis v. Wilson*, 107 Mass. 593; *Hathaway v. Hathaway*, 159 Mass. 585; *Sullivan v. Adner*, 162 Mass. 224, 228; *Simpson v. B. & M. R. R.*, 176 Mass. 359; *White v. New York, etc. R. R. Co.*, 156 Mass. 184, 185; *Hamlin v. N. Y. & N. E. R. R.*, 160 Mass. 459. See also the authorities in note 2, page 339, above.

of the parties.<sup>1</sup> Even newly created rights have been sometimes held to be exceptions, for the purpose of holding them to be in fee, when the word "heirs" was omitted.<sup>2</sup> In many states the statutes have provided that a fee may be created by deed without the use of the word "heirs," but there is no such statute in Massachusetts.

Of course a man cannot have an easement in his own land. If, therefore, he has been accustomed to use a certain way across his land this is not a right of way. But, suppose, that he conveys a part of his land and reserves a way over the granted land, and that this was the way he had been accustomed to use over the granted land in connection with the retained land, this is called an existing way and, in many cases, has been held to be reserved by way of exception; not but that it is a newly created right, but it is thought of as an existing thing, and in such cases the word "heirs" in the clause can be spared. But ordinarily a right of way newly created is by way of reservation, that is, a right of way created in the granted land. Existing ways form an exception to the rule.<sup>3</sup>

In the case of a reservation, as above shown, a man may acquire a right in land without any deed being made to him of the right, for the transaction, as above stated, may be by a deed poll, which deed he alone signs and delivers. There are various cases in the law in which a right in land may be acquired in the absence of a deed or of a will. Familiar illustrations of these are rights acquired by prescription and rights acquired by disseisin; and the case of equitable estoppel furnishes another illustration. But this doctrine of equitable es-

<sup>1</sup> See for instance, *U. S. Co. v. Del. R. R.*, 41 Atl. Rep. 766 (N. J.).

<sup>2</sup> *Ring v. Walker*, 33 Atl. Rep. 174 (Me.).

<sup>3</sup> Cases cited in *Martin v. Cook*, 60 N. W. Rep. 679 (Mich.); 8 Harv. Law Rev. 363; 20 L. R. A. 631, note; *Ring v. Walker*, 33 Atl. Rep. 174 (Me.); *Wells v. Tolman*, 51 N. E. Rep. 271 (N. Y.); *Smith v. Furbish*, 44 Atl. Rep. 406 *et seq.* (N. H.); *Clafin v. Boston & Albany R. R.*, 157 Mass. 493; *White v. N. Y., etc. R. R. Co.*, 156 Mass. 184, 185; *Hamlin v. N. Y. & N. E. R. R.*, 160 Mass. 459.

toppel is, as its title imports, the creation of a court of equity; and a very good illustration of it is afforded by the recent Massachusetts case of *Snow v. Hutchins*.<sup>1</sup> In this case a married woman, being the owner of the land and by a recorded deed to her, released dower and homestead in a deed by her husband as grantor to a third party, the husband receiving in exchange other land which he afterwards sold. She also joined in that deed in release of dower and homestead and for several years, — much less than twenty, — lived within sight of the premises. She, it was claimed, made no claim to the land, but saw the purchaser performing acts of ownership, among others acts consisting of incurring expense in making preparations for building a house. It was held to be for the jury to find what knowledge she had of the effect of her husband's above transactions, and her knowledge on the other matters, as above; and that the jury would be warranted in finding an equitable estoppel. The action was a writ of entry by her, and the equitable defence was specially set up in accordance with the Massachusetts statute authorizing equitable defences to be set up in actions at law.

<sup>1</sup> *Snow v. Hutchins*, 160 Mass. 111; see further Pattee's *Illustrative Cases in Realty*, Part 3, p. 662, note; *Dimond v. Manheim*, 63 N. W. Rep. 495 (Minn.); 9 Harv. Law Rev. 359; 2 Kerr, R. P. § 1081; 2 Dembitz on Land Titles, § 138; *St. Paul's Church v. Hower*, 43 Atl. Rep. 221 (Penn.); *Tracy v. Roberts*, 34 Atl. Rep. 68 (Me.); *LeCoil v. Armstrong Co.*, 39 N. E. Rep. 922 (Ind.); *Redmond v. Excelsior Co.*, 45 Atl. Rep. 422 (Penn.).

## CHAPTER XXVI.

## USES AND TRUSTS.

IN Chapter XII. we discussed the subject of uses and there said that it was expedient to introduce the reader to some acquaintance with the law of that subject, but that we could not develop the subject at that stage, because it was necessary that the reader should have a larger acquaintance with property law in order to comprehend what we wished to say more fully about uses. We think this a suitable place in which to resume the consideration of the law of uses.

Before the Statute of Uses if there were a common-law conveyance, say a feoffment, fine, or common recovery, of a fee simple, and there were no consideration and no declaration of a use, equity raised a resulting use in the grantor and held the grantee who had the technical legal title to be a trustee for the grantor.<sup>1</sup> Of course, before the Statute of Uses the only conveyance of the legal estate was some common-law conveyance. Now, if there were a consideration, or if there were a declaration of a use, equity would not raise a resulting use, and the declaration of a use might be in favor of some third person or it might be in favor of the grantee. Thus, if there were, say, a feoffment to A and his heirs to the use of B and his heirs, B would have the equitable estate and A would be held by the court of equity to be a trustee for him, and, of course, there would be no resulting use. Suppose, again, that the declaration of a use were in favor of the grantee and his heirs, thus a feoffment to A and his heirs to the use of A and his heirs, or more

<sup>1</sup> 2 Wash. R. P. 100-102, 134.

briefly, a feoffment to the use of A and his heirs. Now, even though there were no consideration, yet there would be no resulting use because there is a declaration of a use, and so there could be no resulting use in the grantor.<sup>1</sup>

But if the interest granted were of less quantity than a fee, thus, a conveyance for a term of years or for life or in tail, the services which would be due would be a sufficient consideration so that there would be no resulting use in the grantor,<sup>2</sup> and before the statute of *Quia Emptores* if there were a subinfeudation, even of the fee, there could be no resulting use because the services would be a sufficient consideration.<sup>3</sup>

Coming now to the Statute of Uses in the reign of Henry VIII., the same principle continued to obtain after the Statute of Uses as to conveyances of an interest less than the fee, above mentioned. There is no resulting use because the services are a sufficient consideration.<sup>4</sup> Since the Statute of Uses if there be a common-law conveyance and there be no consideration and, we may add, no acknowledgment in the deed of the receipt of any consideration and no declaration of a use, there is a resulting use in the grantor, like as before the statute, as above shown. But, the Statute of Uses, the office of which is always to transfer the seisin and unite it with the use, transfers the seisin to the grantor, and the result is that the conveyance has come to nothing, for the grantor is just where he began.<sup>5</sup> Since the Statute of Uses if there be a common-law conveyance to A and his heirs to the use of B and his heirs, it is just as before the statute, there is no resulting use, as above shown. But the statute transfers the seisin and unites it with the use in B, giving him the legal estate. Since the Statute of Uses if there be a common-law conveyance to the use of the grantee and his heirs there is no

<sup>1</sup> Williams, R. P. 158.

<sup>2</sup> 2 Wash. R. P. 132.

<sup>3</sup> 1 Law Quart. Rev. 414.

<sup>4</sup> 2 Wash. R. P. 132.

<sup>5</sup> Williams, R. P. 158.

resulting use, because, as above shown, there was no resulting use before the statute, and, like as before the statute, the grantee is in by the common law. So, since the statute, he is likewise in by the common law, and the Statute of Uses had nothing to do with such a case.<sup>1</sup> Doubtless, if the statute had provided that it, the statute, should operate in such a case, it would operate in such a case, but there is no occasion for the statute to operate in such a case, and the statute does not operate in such a case.

The books are filled with cases, many of them very late, in which a man buys land, takes the deed in his own name, and the consideration is paid by another man. Of course, this may be a good grant to the person in whose name the title stands, but the presumption is that there is a resulting trust in the party who pays the money. If, however, the person in whose name the title is taken be the wife of the other person or a child, grandchild, or nephew, the presumption is that it was intended as a gift and there would be no resulting trust. These presumptions may, of course, be overthrown by evidence.<sup>2</sup>

<sup>1</sup> *Fearne on Rems.* 416 (Butler's note); *Williams*, R. P. 158.

<sup>2</sup> *Hallenback v. Rogers*, 40 Atl. Rep. 576 (N. J.); *Kern v. Howell*, 36 Atl. Rep. 872 (Penn.); *Cooley v. Cooley*, 172 Mass. 476; *Bickford v. Bickford*, 35 Atl. Rep. 471, 472 (Vt.); *Fay v. Morrison*, 42 N. E. Rep. 744 (Ill.); *Leslie v. Leslie*, 31 Atl. Rep. 170, 172 (N. J. Ch.); *Dorman v. Dorman*, 58 N. E. Rep. 235 (Ill.); *Kreps v. Kreps*, 47 Atl. Rep. 1029, 1030 (Md.); *McDonough v. O'Neill*, 113 Mass. 92; *Kendall v. Mann*, 11 Allen, 15, 19 note; *Barnard v. Jewett*, 97 Mass. 87; *Titcomb v. Morrill*, 10 Allen, 17; *Urann v. Coates*, 109 Mass. 581; *Livermore v. Aldrich*, 5 Cush. 431; *Jackson v. Stevens*, 108 Mass. 94; *Hunt v. Moore*, 6 Cush. 1; *Cairns v. Colburn*, 104 Mass. 274; *Whitten v. Whitten*, 3 Cush. 196, 197; *Edgerly v. Edgerly*, 112 Mass. 179; *Comerais v. Wesselhoeft*, 114 Mass. 552; *Perkins v. Nichols*, 11 Allen, 545.

It distinctly appearing that there was no intended gift to the wife, the title having been taken in her name and paid for by her husband, she will be held to be a resulting trustee for him. *Gray v. Jordan*, 32 Atl. Rep. 793 (Me.); *Bickford v. Bickford*, 35 Atl. Rep. 471 (Vt.); *Duval v. Duval*, 35 Atl. Rep. 750 (N. J. Ch.). See further, 13 Harv. Law Rev. 227.



In case a title is taken in the name of one person and there is a resulting trust in another person who pays the money, the ordinary way of looking at it is that the estate of the party who pays the money is equitable, and that the person in whose name the title stands is a trustee; but late cases in New Hampshire and Maine hold that the Statute of Uses executes the use in the equitable party, so that he has the legal estate.<sup>1</sup> This novel view is not tenable, for the reason that ordinarily modern deeds contain a declaration of a use in favor of the grantee, and that the other use, the one raised by a court of equity in the party from whom the consideration moves, is a case of a use upon a use, so that the last mentioned estate cannot be executed by the Statute of Uses, but remains an equitable estate.<sup>2</sup> The ordinary modern deed reads, at and after the habendum, as follows, "to have and to hold to the said A. B., his heirs and assigns to their own use and behoof forever." Here is the declaration of the use in favor of the grantee. Another reason which may be given for the unsoundness of the New Hampshire and Maine doctrine is that, if the deed be taken to be a bargain and sale, there is a use raised from that fact in the grantee, and the other use is a case of a use upon a use, so that the estate of the party who pays the money is equitable.

Professor Washburn says that the "ordinary deeds in modern use avoid the effect of raising a resulting use in favor of the grantor, first by inserting therein an acknowledgment of a consideration received by the grantor, and secondly, by declaring thereby the uses of the estate granted, in favor of the grantee, and, if in fee, his heirs and assigns."<sup>3</sup> This statement is rather misleading, because if the deed be taken to be a common-law conveyance, as it usually is in Massachu-

<sup>1</sup> *Fellows v. Ripley*, 45 Atl. Rep. 138 (N. H.); *Winslow v. Young*, 47 Atl. Rep. 149 (Me.).

<sup>2</sup> 13 Harv. Law Rev. 694.

<sup>3</sup> 2 Wash. R. P. 102.

setts, the declaration of a use is alone sufficient to prevent a resulting use, as is above shown.<sup>1</sup>

The recital of the receipt of a consideration in a deed has two aspects: First, it is a contract. Secondly, it is a receipt. As a receipt it can be explained by parol evidence, like any other receipt. As a contract it cannot be controlled by parol evidence as written contracts are not controllable by parol evidence. This means that it is competent for either party to show that a different sum was paid or was agreed to be paid from that mentioned in the deed as the consideration, but that the grantor is not permitted to show that there was nothing paid and received, so as to raise a resulting use in himself.<sup>2</sup>

After the Statute of Uses deeds operating under the Statute of Uses became very common, and we have in Chapter XII. considered the bargain and sale deed and the covenant to stand seised. The simple historical fact is that those conveyances of land which operate under the Statute of Uses so as to transfer the legal estate, were before the Statute of Uses con-

<sup>1</sup> Sheppard's Touchstone (Preston's ed.), 510; 2 Fonblanque's Equity, 25, note (f); 1 Spence's Eq. Jur. 449 *et seq.*; 5 Am. & Eng. Ency. of Law, 435, 436 and note; Williams, R. P. (17th ed.) 143, 166; Tied. R. P. § 801.

<sup>2</sup> Titcomb v. Morrill, 10 Allen, 15; Fitzgerald v. Fitzgerald, 168 Mass. 488, 492; Peirce v. Colcord, 113 Mass. 372; Gould v. Lynde, 114 Mass. 366; Blodgett v. Hildreth, 103 Mass. 484; Hunt v. Moore, 6 Cush. 1; Trafton v. Hawes, 102 Mass. 541; Benson v. Dempster, 55 N. E. Rep. 651 (Ill.); 2 Wash. R. P. 102, 142; Wheeler v. Campbell, 34 Atl. Rep. 35 (Vt.); 2 Devlin on Deeds, § 1189 (note); 1 Gray's Cases on Prop. 537, 481 note, 538 note; Tied. R. P. § 801; Francis Co. v. Grant, 32 Atl. Rep. 936 (Conn.).

But in England there are cases which hold that a grantee will not be permitted to retain land conveyed to him upon an oral trust which he has failed to perform.

Edwards, R. P. (2d ed.) 177; *In re Duke of Marlborough* (1894), 2 Ch. 133. And the following cases cited in *Lovett v. Taylor*, 34 Atl. Rep. 899, 900 (N. J.); *Davies v. Otty*, 33 Beav. 542; *Childers v. Childers*, 3 Kay & J. 310; *Booth v. Turle*, 16 Eq. 182; *Haigh v. Kaye*, 7 Ch. App. 469. See also *Goldsmith v. Goldsmith*, 39 N. E. Rep. 1067 (N. Y.).

tracts merely, and they were bargains and sales or covenants to stand seised. Both of these required that there should be a consideration. In the case of the bargain and sale it was money or money's worth. In the case of the covenant to stand seised the consideration was blood or marriage. Now, it is because there was a consideration that equity interfered and raised a use in the party from whom the consideration moved, holding the owner of the land who had entered into such a contract to be a trustee for the *cestui que use*. Now, the Statute of Uses, as it always does, carries the legal estate and unites it with the use. The result is that after the Statute of Uses bargains and sales and covenants to stand seised became legal conveyances of land.<sup>1</sup> It is thus easily perceived that in these conveyances the consideration is the great thing, and that the declaration of a use in favor of the grantee is not important. But, in *Lovett v. Taylor*,<sup>2</sup> there was a deed of land for which there was no consideration and no acknowledgment of the receipt of one, but there was a declaration of a use in favor of the grantee and his heirs, and the court said that this was to be taken to be a statute of uses conveyance, and that the declaration of the use prevented a resulting use in the grantor. The true solution of such a case would be that the deed should be taken to be a common-law conveyance and, of course, there would be no resulting use because there was a declaration of a use in favor of the grantee and his heirs.

The Statute of Frauds provided that trusts of real estate should be manifested by some writing, but, notwithstanding this provision of the Statute of Frauds, there will be a resulting trust, provided that there be no consideration, no acknowledgment of the receipt of a consideration, and no declaration of a use; but since the Statute of Frauds, if the deed

<sup>1</sup> *In re Hollis Hospital* (1899), 2 Ch. 548; *Fearne on Rems.* 416 (Butler's notes.)

<sup>2</sup> *Lovett v. Taylor*, 34 Atl. Rep. 896 (N. J.).

contain the recital or acknowledgment of the receipt of a consideration, equity will not raise a resulting trust in the grantor.<sup>1</sup>

There are in Massachusetts a good many cases in which deeds of land have been held to operate as statute of uses conveyances, but in these cases ordinarily, if not always, it was necessary so to interpret them in order to give them validity. But the Massachusetts deed ordinarily operates as in the nature of a common-law feoffment with livery of seisin dispensed with by statute.<sup>2</sup> The statute provides that the execution and delivery of a deed shall pass the title without any other act or ceremony. The statute further provides that a deed of quitclaim and release shall be as effectual to pass the title as is a bargain and sale thus showing a recognition in the statute of the statute of uses conveyances.<sup>3</sup> There is a late Massachusetts case<sup>4</sup> in which, curiously, there seems to have been a livery of seisin made upon the land.

The bargain and sale, as already explained, was a contract which equity enforced, and which became under the Statute of Uses a very favorite form of conveying the legal estate. It is in common use to-day in the United States. The bargain

<sup>1</sup> Adams' Equity, 28, 32; *Lloyd v. Spillet* (by Lord Hardwicke), 2 Atk. 150; 1 Gray's Cases on Prop. 535, 537, 481 note, 538 note; *Blodgett v. Hildreth*, 103 Mass. 484; *Gould v. Lynde*, 114 Mass. 366; *Pierce v. Colcord*, 113 Mass. 372; *Titcomb v. Morrill*, 10 Allen, 15; *Hunt v. Moore*, 6 Cush. 1; *Trafton v. Hawes*, 102 Mass. 541; Tied. R. P. § 801; *Francis Co. v. Grant*, 32 Atl. Rep. 936 (Conn.); 2 Devlin on Deeds, § 1189 note.

<sup>2</sup> 2 Wash. R. P. 102, 142, 144, 145, 155; 4 Dane's Abr. ch. 114, Art. 17, § 2; Mass. Statute of 1652, expounded in *French v. French*, 3 N. H. 261, 262; Colonial Statutes, 9 Wm. III. (A. D. 1697); Province Laws, ch. 48; Mass. Statute 1783, ch. 37, § 4; *Wyman v. Brown*, 50 Me. 159-161; *Marshall v. Fiske*, 6 Mass. 32; *Hunt v. Hunt*, 14 Pick. 380; *Abbott v. Holway*, 72 Me. 298; *Crocker's Notes on Common Forms* (3d ed.), 3; *Perry on Trusts*, § 299 note; *Perry v. Weeks*, 137 Mass. 589.

<sup>3</sup> Mass. R. L. ch. 127, §§ 1, 2.

<sup>4</sup> *Perry v. Cross*, 132 Mass. 454.

and sale was and is necessarily upon a pecuniary consideration, and the deed, like other deeds, did and does contain the recital of the receipt of a consideration.

Coming now to the covenant to stand seised, it too was a contract, the consideration being blood or marriage, and equity enforced the contract before the Statute of Uses. The Statute of Uses converted this into a conveyance of the legal estate in the land.<sup>1</sup> If a man conveys land to his wife, it is necessary to make the conveyance to a third party, because he cannot contract with his wife.<sup>2</sup> In some states to-day, however, by statute, a man may convey land directly to his wife.<sup>3</sup> If, then, a man conveys land to A and his heirs to the use of or in trust for the wife of the grantor and her heirs, this may be taken to be either a feoffment to uses or a covenant to stand seised, and, whichever it may be determined to be, the Statute of Uses executes the use in the wife, thus giving her the legal estate in the land.<sup>4</sup> But, suppose the consideration be blood, or a prospective marriage, then the conveyance may be made directly to the grantee. Thus, in *Gale v. Coburn*,<sup>5</sup> a man conveyed land to his son-in-law whose wife was dead, and the court held it to be a good covenant to stand seised, for that the grantee would naturally have a tender interest in the children of the deceased wife, who were the grandchildren of the grantor and the children of the grantee.

The authorities all agree that the fact of marriage or blood need not be stated in the deed as the consideration, but they do not agree whether the fact of marriage or blood must appear

<sup>1</sup> *Fearne on Rems.* 416, note by Butler.

<sup>2</sup> *Co. Litt.* 112 a; *2 Wash. R. P.* 129; *Tied. R. P.* § 775, note 1; *Tudor's Lead. Cases* (3d ed.) 346; *Bryan v. Bradley*, 16 Conn. 486.

<sup>3</sup> In Massachusetts it is the fixed custom to make two deeds. The husband conveys to A and his heirs, and simultaneously A conveys to the wife and her heirs by a separate deed; but, since covenants to stand seised are fully recognized in Massachusetts, it is plain that one deed is sufficient.

<sup>4</sup> *2 Wash. R. P.* 117, 118.

<sup>5</sup> *Gale v. Coburn*, 18 Pick. 401.

in the deed somewhere, or whether it may be proved by extrinsic evidence.<sup>1</sup>

*West v. West*<sup>2</sup> was a case of a deed of land by a man to a woman whom he was about to marry, and was in consideration of the prospective marriage. The deed provided that it should take effect upon the marriage, and then that the grantor should have an estate for his own life, and that the woman, the grantee, if she should survive him, should have the land for her comfortable support. It was not limited to her and her heirs, therefore she took but a life estate. This deed was held to be a good covenant to stand seised. It could not be good as a common-law conveyance, because it created an estate of freehold to begin *in futuro*.

We have seen that the common-law conveyance of lease and release necessitated an entry upon the land by the lessee, whose lease gave him a term of years, and that having entered he was in a position to have the freehold released to him by a deed of release. We have also seen that very shortly after the Statute of Uses the Statute of Enrolments required that a bargain and sale of a freehold estate should be by deed of indenture and enrolled. Now, to avoid the publicity involved in this enrolling, Sir Francis Moore, shortly after the Statute of Uses invented what we call for convenience the statute of uses lease and release. The lease was usually for one year, and was a bargain and sale deed, and recited the receipt of a nominal sum of money. This raised a use in the grantee, tenant for years, and the Statute of Uses executed the use by transferring to the grantee, bargainee, the legal interest. It is

<sup>1</sup> *Bryan v. Bradley*, 16 Conn. 486; *French v. French*, 3 N. H. 257, 258, 261, 265; *Gale v. Coburn*, 18 Pick. 397, 401, 402; *Wallis v. Wallis*, 4 Mass. 135; 2 Wash. R. P. 155.

<sup>2</sup> *West v. West*, 155 Mass. 317. See further, *Synge v. Synge* (1894), 1 Q. B. 466.

The heirs of a grantor cannot impeach, after his death, a title conferred upon a woman in consideration of their marriage, although it appeared that she had a husband living at the time of the marriage ceremony, whom she supposed to be dead. *Ogden v. McHugh*, 167 Mass. 276.

to be observed that it did not transfer the seisin because the grantee was given only a term of years. Now, the grantee was by the Statute of Uses in constructive possession of the land so that he did not have to make an entry. It will be remembered that if there be a feoffment to A and his heirs to the use of B and his heirs, B is by the Statute of Uses in constructive possession of the land although he never made an entry. Now, this tenant for years being in constructive possession was in a position to have the freehold released to him, and so the next day the grantor would deliver to him a deed releasing the freehold, usually the fee, to him.<sup>1</sup> The statute of uses lease and release, while it did not supersede feoffments, fines, and recoveries, nor displace bargains and sales of the freehold estate, became the common mode of conveying lands in England, and so continued down to so late as the year 1841.<sup>2</sup>

The conveyance by lease and release, whether it be the common-law conveyance, or what we call the statute of uses conveyance of lease and release, operates by transmutation of possession.<sup>3</sup> All common-law conveyances operate by transmutation of possession, and so does the statute of uses conveyance of lease and release, and curiously the grantee in the statute of uses conveyance of lease and release is said to be in by the common law, even though it is directed to be to his own use.<sup>4</sup> In other words, it is treated, for most purposes, like a common-law conveyance. Now, the reason why all these conveyances operate by transmutation of possession is because, and it is a very elementary principle, the corporeal hereditament cannot be created to begin *in futuro* at common law, that is to say, all of these conveyances must transfer the possession immediately. This would be very evident if we

<sup>1</sup> 2 Wash. R. P. 130, 131, 140, 141; Smith's Essay, § 137, *et seq.*

<sup>2</sup> Williams on Seisin, 146.

<sup>3</sup> Gilbert on Uses (Sugden's ed.) 163, 229; 2 Wash. R. P. 283; 2 Cruise's Digest, 264; *Roe v. Tranmer*, 2 Wilson, 75.

<sup>4</sup> Fearne on Rems. 416, note by Butler.

were to illustrate by the feoffment, for one cannot conceive of the owner of land making a feoffment to A and his heirs to begin at some future time.

*Roe v. Tranmer*<sup>1</sup> is the leading authority for the position that a statute of uses conveyance of lease and release cannot create a freehold to begin at a future time. Thus the owner of land makes a bargain and sale lease for one year. He then releases the fee simple to the lessee to begin in him at some future time. This conveyance is ineffectual for the reasons just stated. There may be a conveyance by the statute of uses lease and release to A and his heirs to the use of B and his heirs to begin in B at some future time; but there can also be a conveyance to A and his heirs by feoffment, fine, common recovery, or the common-law lease and release to the use of B and his heirs to begin in B at some future time.<sup>2</sup> Thus one can use a common-law conveyance to create an estate of freehold to begin in a third party at some future time under the law of uses. These are called springing uses, and they completely correspond to the executory devise of the second class.

Returning now to the late Massachusetts case of *West v. West*,<sup>3</sup> it was the case of a deed of land by a man to a woman whom he was about to marry, and was in consideration of the prospective marriage. The deed provided that it should take effect upon the marriage, and then that the grantor should have an estate for his own life, and that the woman, the grantee, if she should survive him, should have the land for her comfortable support. We can now explain that in this case there was a springing use in the woman, the grantee, until the marriage should occur; in other words, it was to begin in her upon the marriage.<sup>4</sup> The next question is, what was the state of affairs after the marriage? and the best way of looking at it from that point of view is that it was a life estate in pos-

<sup>1</sup> *Roe v. Tranmer*, 2 Wilson, 75.

<sup>2</sup> 2 Wash. R. P. 283; 2 Black. Com. 144 (Shars. ed.) note by Chitty.

<sup>3</sup> *West v. West*, 155 Mass. 317.

<sup>4</sup> 1 Sanders on Uses (5th ed.) 152.



session in the grantor, with vested remainder over to the wife for life, the reversion in fee being in the husband.<sup>1</sup>

The Statute of Uses and the Statute of Wills added an enormous number of new principles to the body of the law. They did not supersede the old common law, but they added

<sup>1</sup> In *Jackson v. Dunsbath*, 1 Johnson's Cases (N. Y.), 92, there was a conveyance by a father to his son in fee, after the decease of the father. It was held that the deed might operate either as a bargain and sale, or as a covenant to stand seised. The father had thereafter made a mortgage of the premises, and it was claimed that this destroyed the use in the son, on the ground that it was a future use, and had not, at the time of the execution of the mortgage, become executed. But the court held that it was not a future use, but that the transaction amounted to a life estate in the father, with a vested remainder in fee in the son by way of use. See further, 2 Wash. R. P. 123; Gilbert on Uses (Sugden's ed.) 125, 126 and note, 286; 1 Sanders on Uses (5th ed.) 152; *Exum v. Canty*, 34 Miss. 533, 569.

A conveyance by a father to his two sons, the sons to come into the possession after the decease of the grantor and his wife, and the deed to take effect at that time, was held to create vested remainders in the sons subject to the life estates; *Watson v. Cressey*, 79 Me. 381; and see the same deed in *Hall v. Cressey*, 43 Atl. Rep. 118 (Me.); and see *Haines v. Weirick*, 58 N. E. Rep. 712 (Ind.).

In *Jenkins v. Jenkins*, 1 Mill's Constitutional Court Report (S. C.), 48, a father made a deed to his son for life, remainder to the children of the son, the grantor reserving a life estate. It was held that the grantor could not affect the conveyance by his will.

In *Cribb v. Rogers*, 12 S. C. 564, the consideration mentioned was "love," etc., and "natural affection," the grantee being a step-daughter only of the grantor. The deed was to the grantee in fee, the grantor "reserving" a life estate. It was held that it passed a present interest, subject to the usufruct for the life of the grantor. (Cited in 1 Kerr, R. P. § 323.) See also *Latimer v. Latimer*, 51 N. E. Rep. 548, 552 (Ill.).

A deed to take effect after the death of the grantor was held good. But the case does not indicate upon what theory of law; *Harshbarger v. Carroll*, 45 N. E. Rep. 565 (Ill.). See further *Bowles v. Bowles*, 52 N. E. Rep. 437 (Ill.); *Kelley v. Skinner*, 53 N. E. Rep. 233 (Ind.).

There are cases in which an instrument was expressed to take effect after the maker's death, and was held to constitute a will. See *In re Kisecker's Estate*, 42 Atl. Rep. 886 (Penn.); *Stroup v. Stroup*, 39 N. E. Rep. 867 (Ind.).

In the following cases the deeds were held to be *in præsentia*, and not testamentary; *Kelly v. Parker*, 54 N. E. Rep. 615 (Ill.); *Wilson v. Carrico*, 40 N. E. Rep. 50 (Ind.).

to the bulk of the total mass of law, and the law of uses and the law of executory devises contain a complexity which is very different from the simplicity of the common law.

Reversions and vested remainders could be conveyed by the statute of uses conveyance of lease and release.<sup>1</sup>

The question, how could the Statute of Uses execute the use in a statute of uses conveyance by way of lease and release to A and his heirs to the use of B and his heirs, we shall answer shortly. It is to be observed that the Statute of Uses in this case operates twice: first, by executing the bargain and sale lease for one year, and then by executing the use which is given to B and his heirs. Of course, as sufficiently indicated above, one can make a statute of uses conveyance of lease and release to A and his heirs to the use of B and his heirs.

We must distinguish between existing terms of years and newly created terms of years. Existing terms of years are called leaseholds. Now, before the Statute of Uses the owner of a leasehold could not effectually grant it to A to the use of B. Equity would not recognize any trust in this case. Sanders gives as the reason, that the relation between the lessor and the lessee was of such a nature that no use could be raised in the leasehold.<sup>2</sup> Another reason, and we think the better of the two, is that the grantor had no seisin, and we may add, that A, the grantee, had no seisin,<sup>3</sup> hence equity would take no notice of it; but, after the Statute of Uses courts of equity came to uphold the interest of B, holding A to be a trustee for B, and upon the grand equitable principle that A was in conscience bound to perform the trust;<sup>4</sup>

<sup>1</sup> Gilbert on Uses (Sugden's ed.) 230-232; 2 Preston on Conv. 214, 215.

<sup>2</sup> 1 Sanders on Uses (5th ed.) 19-36.

<sup>3</sup> 2 Wash. R. P. 98; Tied. R. P. § 446; Crabb, R. P. § 1611.

<sup>4</sup> 1 Sanders on Uses (5th ed.) 32, 33; 2 Black. Com. 335 note, 336; 1 Spence's Eq. Jur. 466; Crabb, R. P. § 1705; Sugden's Introduction to Gilbert on Uses, 60, 61; 2 Williams' Saunders' Rep. (6th ed.) 11 g, note; Tied. R. P. § 462; Gilbert on Uses (Sugden's ed.) 80 note 7.

and everybody knows that now-a-days nothing is more common than trusts of personal property of every kind. But the Statute of Uses has no connection with such a matter, because the assignor thereof is not seised and because seisin cannot be predicated of it.<sup>1</sup>

Turning now to newly created terms of years, we find that if one seised of land makes a lease to A to the use of B for a term of years, equity holds A to be a trustee for B,<sup>2</sup> and for the reason that the grantor is seised;<sup>3</sup> so we see what a large part seisin plays in the law of uses. But the Statute of Uses cannot execute the use in B, because A, the grantee, has no seisin upon which the statute can act.<sup>4</sup> But if one seised of land should make a feoffment to A and his heirs to the use of B for a term of years, the Statute of Uses will execute the use in B, because A has the seisin upon which the statute can act.<sup>5</sup> The grantor has a resulting use which the statute immediately executes in him, so that instantaneously the transaction becomes, in legal effect, nothing but a lease for years of the legal estate to B.<sup>6</sup>

The Statute of Uses provides that the use shall be executed, in other words, that the statute shall apply if one be seised of any honors, castles, *et cetera*, to the use, confidence, or trust of another person for life or for a term of years. It is under this provision of the statute that the use is executed in the

<sup>1</sup> 2 Black. Com. 330, 336; Gray on Perp. §§ 73, 79, 148; 2 Wash. R. P. 98; Tied. R. P. §§ 462, 470; Gilbert on Uses (Sugden's ed.) 79, 80 note; Williams on Seisin, 141.

<sup>2</sup> 1 Eq. Cases Abridged, 383; 2 Wash. R. P. 98, 162; Crabb, R. P. § 1611; Anonymous, Brownlow & Goldesborough's Rep. (Eng. reports) 40.

<sup>3</sup> Crabb, R. P. § 1611; Anonymous, Brownlow & Goldesborough's Rep. (Eng. reports) 40.

<sup>4</sup> See the authorities in note 2, above.

<sup>5</sup> Inglefield's Case, Anderson's Rep. 293, 294; 2 Black. Com. 335, note; Gilbert on Uses, 199; Co. Litt. 271 b, note by Butler (pl. 8); Hopkins v. Hopkins, 1 Atk. 590, 591; Willis on Trustees, 22 note; 2 Williams' Saunders' Rep. (6th ed.) 11 g, note.

<sup>6</sup> 2 Wash. R. P. 133; 1 Sanders on Uses (5th ed.) 96, 101, 102; Cornish on Uses, 76.

bargain and sale deed for one year,<sup>1</sup> which, as has already been seen, is the bargain and sale part of the statute of uses conveyance of lease and release.

Reversions, remainders, and rents may have a use raised in them, and the Statute of Uses will execute the use. It is generally said in the text-books that this is to be accounted for by the fact that seisin can be predicated of these. Now, it is unnecessary to again go over the ground in respect to seisin, but what is really meant by this expression is, as to reversions and remainders, that they are to be contrasted with such property rights as *profits à prendre* and easements, for nobody associates seisin with these in any such way as one may associate seisin with freehold remainders and freehold reversions. Of course, as shown in an early chapter, if an incorporeal hereditament be appurtenant to a corporeal hereditament one can predicate seisin of it, but the reversion and remainder do become in time the actual possession of the land, so that the owner thereof in time becomes actually seised of the land. As to rents, the Statute of Uses expressly provides for the execution of the use in a rent, and in an early chapter we showed how that the owner of a rent was considered as having the actual seisin of it, or what is regarded as the equivalent of the actual seisin of it.

In Chapter XII. we introduced the expression "initial seisin," and defined it to be the seisin of the creator of the estate, as distinguished from the seisin of the estate as found in the person to whom the statute has passed it; and further, that it is not that there are two seisins, but only that it is the seisin looked at from two points of view. Thus, in a feoffment to A and his heirs, to the use of B and his heirs, to the use of C and his heirs, the initial seisin is in the feoffor, it is transferred by the common-law conveyance to A, and is still the initial seisin. It is picked up by the statute in A and carried over to B and is no longer the initial seisin, and the estate of C can

<sup>1</sup> Williams on Seisin, 141.

only be upheld in equity, it being a case of a use upon a use. This form was invented, says Spence, after the Statute of Uses in order to get around the statute; in other words, in order to preserve the equitable estate.<sup>1</sup> It was held shortly after the Statute of Uses in *Tyrrel's Case*,<sup>2</sup> that if there be a bargain and sale deed to A and his heirs to the use of B and his heirs, the estate of B is equitable, for that the statute cannot execute it, the statute having already executed the use in A. Now, the initial seisin is in the grantor, and is transferred by the statute to A, and it is no longer the initial seisin, and it cannot be carried over to B. We are now in a position to understand what was referred to a few pages back, namely, why it is that in a statute of uses conveyance of lease and release to A and his heirs, to the use of B and his heirs, the statute executes the freehold estate in B, although the statute has already executed the use in A. The use executed in A is merely of a term of years. The statute acts upon the seisin in the grantor and transfers to A a legal estate for a term of years, but it has not moved the seisin. When, then, at a later day the grantor executes and delivers to A a deed of release releasing the fee to him and his heirs to the use of B and his heirs, the statute, now for the first time, moves the seisin, transferring it from A and lodging it in B. There is not, in such a case, a use upon a use at all, and, applying the term "initial seisin," it is the initial seisin which the statute picks up in A and transfers to B.

The operative words in an ordinary modern deed are "give, grant, bargain, sell, and convey." The words "give" and "grant" are very ancient, and in the Latin form were used from the earliest times in deeds of feoffment and in deeds of grant.<sup>3</sup> An ordinary deed begins like this: "Know all men by these presents that I," *et cetera*; and so the ancient deed reads in the Latin: "*sciatis me dedisse et concessisse*," know that I

<sup>1</sup> 1 Spence's Eq. Jur. 490.

<sup>2</sup> *Tyrrel's Case*, Dyer, 155 a.

<sup>3</sup> Bigelow on Estoppel (3d ed.) 351.

have given and granted.<sup>1</sup> Now these operative words above quoted are good words to support a feoffment, or a grant, or a bargain and sale, or a covenant to stand seised,<sup>2</sup> and it has been recently held in Massachusetts, in *Sims v. Pierce*,<sup>3</sup> that the words "lease, demise, let, and convey" are good, operative words in a deed to pass the fee.

It is a very ancient principle of law that, if the proper operative words are present in the deed, the deed shall be taken to be that mode of conveyance which will best effectuate the intention of the parties, assuming that the appropriate consideration exists.<sup>4</sup> Thus, in *French v. French*<sup>5</sup> there was a deed by a son to his father which was not properly witnessed so as to satisfy the statutes of New Hampshire, but the court upheld it as a good covenant to stand seised; and there are very numerous illustrations of the principle, above mentioned, that a deed will be interpreted in a way to support it, if this can be done.

In this connection we will point out two very important practical rules respecting deeds. The first one is, that when the provisions of a deed are equivocal, the language will be taken more strongly against the grantor, for it is he who makes the deed, or, as it is sometimes expressed, it is he who holds the pen.<sup>6</sup> The other practical rule, and one much applied in very late cases, is, that the practical construction put upon a deed by the parties will be very good evidence of the meaning of the deed.<sup>7</sup>

<sup>1</sup> 2 Pollock & Maitland, 87, 93 note.

<sup>2</sup> Bigelow on Estoppel (3d ed.) 351.

<sup>3</sup> *Sims v. Pierce*, 157 Mass. 52, 55. See further, Maupin on Marketable Title, § 19 and note.

<sup>4</sup> *Chenery v. Stevens*, 97 Mass. 85, 86; *Carr v. Richardson*, 157 Mass. 578; *Packard v. Old Colony R. R.*, 168 Mass. 96; Tied. R. P. § 782.

<sup>5</sup> *French v. French*, 3 N. H. 234. See further, *Cox v. Edwards*, 14 Mass. 492. See, in connection with *Cox v. Edwards*, *Dole v. Thurlow*, 12 Met. 162; Tied. R. P. § 780; 2 Wash. R. P. 148.

<sup>6</sup> *Stone v. Pillsbury*, 167 Mass. 337; *Clark v. Beloff*, 41 Atl. Rep. 802 (Conn.).

<sup>7</sup> *Whittenton Manfg. Co. v. Staples*, 164 Mass. 319; *Reynolds v. Boston Rubber Co.*, 160 Mass. 245; *Crocker v. Cotting*, 166 Mass. 187; *Quigley*

There is an erroneous doctrine in Massachusetts, and it found expression in *Trafton v. Hawes*.<sup>1</sup> This was a case of a deed of land to a woman and her heirs to take effect after the grantor's decease. The deed provided that she should keep his house and take care of him. The deed contained the usual operative words, "give, grant, bargain sell, and convey." There was also the usual acknowledgment of the receipt of a consideration. There was no evidence of any relation by blood or marriage between the parties. Evidently here was the creation of a freehold estate to begin *in futuro*. Evidently it could not be good as a common-law conveyance. The court held that it should be supported as a covenant to stand seised, that it could not be supported as a bargain and sale, and that a covenant to stand seised could be upon a pecuniary consideration. They relied upon the expression of the court in *Welsh v. Foster*.<sup>2</sup> The theory of these Massachusetts cases is that, if this be taken to be a bargain and sale, there is an immediate use in the grantee, and then that there is a use in the grantor, and that this would be a use upon a use, but that there is no such difficulty in a covenant to stand seised. As remarked by Professor Gray,<sup>3</sup> here are two manifest errors, the one being that if by bargain and sale it is a use upon a use, and the other being that a covenant to stand seised can be upon a pecuniary consideration, and he well adds that the practical effect is produced of one error neutralizing the other.

We have above seen that the substantial difference between bargains and sales and covenants to stand seised lies in the matter of the consideration; therefore, if this would be

*v. Baker*, 169 Mass. 303; *Brown v. Mercantile Co.*, 40 Atl. Rep. 261; *Dakin v. Savage*, 172 Mass. 23; *Roush v. Roush*, 55 N. E. Rep. 1019 (Ind.); *Jones*, R. P. § 334; *Jones on Easements*, § 390; *Clapp v. Wilder*, 176 Mass. 341, 342; *Richardson v. Watts*, 48 Atl. Rep. 183 (Me.); *O'Connell v. Cox*, 179 Mass. 250.

<sup>1</sup> *Trafton v. Hawes*, 102 Mass. 533.

<sup>2</sup> *Welsh v. Foster*, 12 Mass. 93.

<sup>3</sup> *Gray on Perp.* § 57.

a bad bargain and sale it would be a bad covenant to stand seised, even if the matter of consideration should not be taken into account.

One way of stating the fallacy of this doctrine is this: If, indeed, there be an immediate use in the grantee, then the purpose of the deed is, of course, defeated because the deed provides that it is the grantor who is to have the immediate use, and that the grantee is to have the use afterwards. Another mode of stating the objection to this doctrine is that of Professor Gray.<sup>1</sup> He says that the fallacy is obvious, that the use in the grantee does not arise until the future event shall occur, that is, when the grantor shall die, and that meantime the grantor retains his original estate. Another mode of stating the objection to this doctrine is found in *Wyman v. Brown*.<sup>2</sup> The court in that case says that until the occurrence of the future event the use results to the grantor, and that the use in the grantee is not a use upon a use, but is a use after a use. Now, any or all of these modes of stating the objection may be put into one proposition, namely, that the seisin is not moved by the statute until the occurrence of the future event, at which time it is united with the use in the grantee.

But while the deed in *Trafton v. Hawes* ought to have been sustained as a perfectly good bargain and sale, it does not follow that one can make a bargain and sale of land to A and his heirs to the use of the unborn son of B. This, indeed, would be a future use, but it would also be, evidently, a use upon a use; in other words, the intention would not be carried out of giving the unborn son of B a legal estate. It would have to be an equitable estate.

We see, then, that if one wishes to create a freehold estate to begin in the future by a deed, he has got to do it under the Statute of Uses. There are some cases, of which *Martin v.*

<sup>1</sup> Gray on Perp. § 57.

<sup>2</sup> *Wyman v. Brown*, 50 Me. 139, 157, 158.



Cook<sup>1</sup> is an illustration, in which this matter has been worked out by reservation and exception. But we think this to be an erroneous application of the law of reservations and exceptions, a subject which we dealt with in the next preceding chapter. The law of uses is entirely adequate for the working out of all such cases. But it is held in *Abbot v. Holway*<sup>2</sup> that under the statutes of Maine a deed may operate as in the nature of a feoffment, and without the intervention of uses at all, and create a freehold to begin in the future. Of course, we know that statutes work wonders, but we think this an unnecessary aberration from elementary principles, and the recent English case of *Savill v. Bethell*<sup>3</sup> holds as follows. First, it should be mentioned that in England now-a-days the statutory deed of grant used to convey real estate has superseded all the old forms of conveyance. It will be remembered that the deed of grant was the ordinary common-law conveyance in the creation and assignment of incorporeal hereditaments, but under the English statutes it is now used to convey the corporeal hereditament as well. Now, in *Savill v. Bethell* the court decided that a freehold estate could not be created to begin *in futuro* by a statutory deed of grant, but that it should be taken like a common-law conveyance.

We have already said that if there be a common-law conveyance which contains the declaration of a use in favor of the grantee, any use limited upon it constitutes a case of a use upon a use; and, now that we have considered the conveyance by lease and release operating under the Statute of Uses, we may broaden the statement and say that if there be a conveyance operating by transmutation of possession which contains the declaration of a use in favor of the grantee, any use limited upon it constitutes a case of a use upon a use. We have already mentioned that we should find some cases

<sup>1</sup> *Martin v. Cook*, 60 N. W. Rep. 679 (Mich.).

<sup>2</sup> *Abbot v. Holway*, 72 Me. 298.

<sup>3</sup> *Savill v. Bethell* (1902), 2 Ch. 523.

in which the declaration of this first use has not been attended to. *Thatcher v. Omans*<sup>1</sup> was a case in which there was a deed by husband and wife, of land owned exclusively by the wife, in fee simple to A and his heirs to the use of the husband and wife, their heirs and assigns. The court said that this cannot be a bargain and sale, because the estate of the husband and wife would be equitable, being a use upon a use and in *Hunt v. Hunt*<sup>2</sup> the court says that in such a case it must be taken to be a feoffment to A and his heirs to the use of the *cestui que use*, which the statute will execute in the *cestui que use*, thus giving him the legal estate according to the intention of the parties to the deed. Now, in these two cases and others like them we cannot doubt that there was really a declaration of a use after the habendum, according to the regular Massachusetts form, and, if so, the court failed to attend to it and to mention it. But, in *Carr v. Richardson*<sup>3</sup> the use declared in the grantee was recognized, but was purposely ignored by the court, in order to carry out what was obviously the intention of the grantor. The deed was to A and her heirs to the use of A for her life, and then over to the use of the grantor and his heirs and B and his heirs by way of remainder, of course, and then to have and to hold to A and her heirs and assigns to their own use and behoof forever, and upon the trusts before mentioned. A at the time the case arose had died leaving, as her heirs, minor grandchildren. The court said that, were they to regard the use declared in favor of the grantee A, it would create a use upon a use, and that the technical legal title would have descended to these minor grandchildren, from whom it would be necessary and inconvenient to get a conveyance of the land, and that it was not to be supposed that the grantor intended thus to create a dry trust, and that the deed must be taken to be a feoffment to A and her

<sup>1</sup> *Thatcher v. Omans*, 3 Pick. 521.

<sup>2</sup> *Hunt v. Hunt*, 14 Pick. 380.

<sup>3</sup> *Carr v. Richardson*, 157 Mass. 576; see *McElroy v. McElroy*, 113 Mass. 509.

heirs to the uses, above mentioned, which the Statute of Uses executed, thus giving A a legal estate for her life, and giving the grantor and B legal remainders in fee simple. On the other hand, there is the case of *Conway v. Ashfield*,<sup>1</sup> in which the use declared after the habendum was given force and effect to. It was a deed of land to A and B, reciting a pecuniary consideration as paid by them, reserving and giving to C the use of the premises during his natural life, he paying the taxes, and then to have and to hold to the said A and B, their heirs and assigns, to their own use and behoof forever. The court said that the deed recognized the payment of the consideration by A and B, and that there was a full declaration of uses in their favor, so that the gift to C was of a use upon a use, and that the estate of C was therefore equitable.

A contingent use is a contingent remainder by way of use. It is subject to all the laws of contingent remainders, as, for example, that it must arise immediately upon the expiration of the particular estate like any other legal remainder, and, unless it is protected by statute, it is destructible like any other contingent remainder in the ways already pointed out.<sup>2</sup> We have already seen that the estates which sprang up under the Statutes of Uses and of Wills are very different from estates known to the common law, and we have already mentioned, in connection with the case of *West v. West*,<sup>3</sup> that a springing use corresponds to the executory devise of the second class. Just as the executory devise of the second class cuts short the estate of the testator's heirs, it, the springing use, cuts short the estate of the grantor.<sup>4</sup> *West v. West*, above, is one good illustration. A text-book form would be this: feoffment to A and his heirs to the use of B and his heirs from and after the first of next January.<sup>5</sup> Then, again, the

<sup>1</sup> *Conway v. Ashfield*, 110 Mass. 114.

<sup>2</sup> 4 Kent's Com. 295; 2 Wash. R. P. 276, 277.

<sup>3</sup> *West v. West*, 155 Mass. 317.

<sup>4</sup> Gray on Perp. § 54.

<sup>5</sup> 2 Wash. R. P. 281, 282.

rule that an estate will be a remainder if it can be so taken applies in uses, and can be illustrated in the following way, for example, feoffment to X and his heirs to the use of A for life, and, after the deaths of A and B, to the use of C and his heirs. Of course, if this be taken to be a contingent use, as above defined, C can only take provided that B be dead when the particular estate of A ends by his death. In other words, the rule applies that the remainder must arise immediately upon the expiration of the particular estate. But if it be a feoffment to X and his heirs, to the use of C and his heirs after the deaths of A and B, this is a good springing use without any reference to whether B outlives A or not.<sup>1</sup>

Now, just as the springing use corresponds to the second class of the executory devise, so the shifting use corresponds to the first class of the executory devise.<sup>2</sup> A good illustration is, feoffment to X and his heirs to the use of A and his heirs, and, if A die without issue living at his death (definite failure), then to the use of B and his heirs. This is the ordinary case of the conditional limitation. Unfortunately these principles are not understood by all the courts, and in *Palmer v. Cook*<sup>3</sup> it was held that in a deed a limitation of a fee in defeasance of another fee was void, just as though the deed had got to be taken as a common-law conveyance. Of course, the estate given by the limitation over should have been recognized, and the Statute of Uses is efficient for any such purpose, like as the Statute of Wills is efficient to support limitations over by way of executory devise. Another illustration of a shifting use, given in the books, is an ordinary limitation by marriage settlement. The owner of land conveys it to X and his heirs to the use of the settlor (grantor) and his heirs until the marriage shall occur, and then over to the use of the intended husband or wife, as the case may be, and so on down in the line of their

<sup>1</sup> 2 Wash. R. P. 283.

<sup>2</sup> Gray on Perp. § 54.

<sup>3</sup> *Palmer v. Cook*, 42 N. E. Rep. 796 (Ill.).

issue. These uses are regarded as shifting, first, from the grantor, and so on.<sup>1</sup> In the case of *Leonard v. Southworth*<sup>2</sup> a man owned a reversion in fee simple which was expectant upon a life estate. He conveyed this reversion by deed to A and B and their heirs to take as tenants in common; and the deed provided that, in case either of them should die before the expiration of the life estate, the property should go to the survivor and his heirs. The habendum was to, and the covenants were to and with, A and B and their heirs, as tenants in common, and the deed was expressed to be to the use of A and B and their heirs. A died before the expiration of the life estate, and after the expiration of the life estate his heirs conveyed half the land. It was claimed that there was a joint tenancy which the Massachusetts statute, of course, would convert into a tenancy in common; but the court held that it could not be a joint tenancy, because the deed was to A and B throughout as tenants in common, and that the deed created a shifting use, so that, upon the death of A, his share went over to B. Now it is reasonable to take this deed to be a grant to uses, the subject-matter being an incorporeal hereditament, namely, a reversion in fee expectant upon a life estate; but we think there is no objection to taking it to be a feoffment to uses, because under the Massachusetts statute, as heretofore shown, livery of seisin is dispensed with, and, with that requirement obviated, we see no reason why a reversion may not be conveyed by feoffment, as well as by fine or recovery, or the statute of uses conveyance of lease and release.

The words "contingent," "springing," and "shifting" are used in the books in a very loose way.

It is an open question to what extent a grantor who has created a future use may defeat his conveyance before any future use has arisen, by conveying the real estate to a third

<sup>1</sup> Williams, R. P. 290, 291.

<sup>2</sup> *Leonard v. Southworth*, 164 Mass. 52.

party for a valuable consideration and without notice. But Sugden in his edition of Gilbert on Uses<sup>1</sup> denies that this can be done in the case of a marriage settlement, at least if the conveyance be by transmutation of possession. This question in the United States would seem to be governed by our system of recording deeds. In this country if a deed has been executed and delivered it is good as against a subsequent grantee unless he takes for a valuable consideration and without notice. If the first deed has been recorded in the registry of deeds, as is usually done, this record is constructive notice to the subsequent grantee.

Suppose there be a covenant to stand seised to one or more future uses, the question is, where is the seisin to support these future uses as they may arise, and the answer is that it is in the covenantor.<sup>2</sup> But suppose that one or more future uses, contingent, springing, or shifting, be raised by a conveyance operating by transmutation of possession. This question is much more difficult than the other question. Suppose, then, that we have one or more future uses created by a conveyance operating by transmutation of possession. As already seen, this may be a feoffment, fine, or recovery, or lease and release, and, for convenience, we will speak of it as a feoffment. Now, as soon as some use has become executed, where is the seisin to serve the future uses as they shall thereafter arise? One theory was, that upon the first use becoming executed all seisin was extracted from the feoffee, and that the seisin was then "*in nubibus*." This theory has been discarded.<sup>3</sup> Another theory was the scintilla theory, which was, that upon the first use becoming executed all the seisin had been extracted from the feoffee, except a scintilla of it, a spark, and that this scintilla of seisin was sufficient to serve the

<sup>1</sup> Gilbert on Uses (Sugden's ed.) 286 and note.

<sup>2</sup> 2 Wash. R. P. 122.

<sup>3</sup> 2 Wash. R. P. 124, 125, 278-280, 293; Tied. R. P. §§ 479-481; Sugden on Powers (8th ed.) 19.

future uses as they should arise.<sup>1</sup> Suppose, then, the case of a springing use. Suppose the owner of the land conveys it to X and his heirs to the use of A and his heirs from and after some future time or event. Of course, there is a resulting use in the feoffor which the Statute of Uses immediately executes,<sup>2</sup> and the question is, why does not the seisin of the feoffor suffice to serve the future use when it shall arise? The answer is that that would be a use upon a use, because the estate of the feoffor is a resulting use to which the Statute of Uses has already carried back the seisin; and so in the case of any future use, whether springing, contingent, or shifting, it is evident that the seisin to support any future use which may afterwards arise cannot be found in an executed use, for that would be a use upon a use.<sup>3</sup> Now, this difficulty was gotten around by the scintilla theory, which was that as soon as the first use had become executed and the seisin thereby extracted from the feoffee, yet that there was a scintilla of seisin left in him to serve the future uses as they should arise. But the practical difficulty was considered too great, because, if the party in possession of the land should be disseised at any time, the feoffee having the scintilla of seisin might enter and convey the land to a *bona fide* purchaser for value and without notice, and thus defeat the future uses;<sup>4</sup> for it must be remembered that the feoffees might be mere men of straw, who were used to perform a part in the machinery of the transaction. The result is that the scintilla theory has been discarded, and the theory which is now universally accepted is the theory of relation back,<sup>5</sup> and this theory is now incorporated

<sup>1</sup> Sugden on Powers (8th ed.) 19, 20; Sugden on Powers (1st Am. ed.) 11 *et seq.*; 1 Gray's Cases on Prop. 509 note, quoting, 1 Leake, 116; 2 Wash. R. P. 278-281; Elphinstone's and others' 4th ed. of Good-eve on R. P. 280; 1 Spence, Eq. Jur. 485 and note; Williams, R. P. 293; Tied. R. P. §§ 479-481; 4 Kent's Com. 238-246; Gilbert on Uses (Sugden's ed.) 131, note 10.

<sup>2</sup> Williams, R. P. 158; 4 Kent's Com. 297.

<sup>3</sup> 2 Wash. R. P. 278; Cornish on Uses, 86, 119-121.

<sup>4</sup> See the authorities in note 1, above.

<sup>5</sup> See the authorities in note 1, above.

into a statute in England.<sup>1</sup> The theory is this that from the moment that the first use has become executed all seisin is extracted out of the feoffee, and that the future uses are served by relation to the seisin that once was in the feoffee, or, as it is well expressed, the seisin that was momentarily in the feoffee.<sup>2</sup>

Towards the close of Chapter X. we said that in a limitation to trustees by deed, the word "heirs" is not always necessary in order to create a fee in the trustees, and, further, that the word "heirs" may be present and yet the trustees not take a fee. We now inquire concerning the necessity of the word "heirs" in the limitation of the equitable estate in order to give the *cestui que trust* a fee in a deed. In *In re Whiston's Settlement*<sup>3</sup> it was held that the word "heirs" is required in connection with the limitation of the equitable estate in order to give the *cestui que trust* a fee in a deed. But we think that by the better opinion the word "heirs" is not necessary in such a case.<sup>4</sup>

If the *cestuis que trust*, if each be *sui juris*, unanimously decide to take the estate in the form in which the testator left it to them, as, for instance, if the testator created a trust for the sale of the land, and the *cestuis que trust* prefer not to have the land sold, but to take the land itself instead of the proceeds of a sale of the land, they can do so.<sup>5</sup> We present this simply as an illustration of a great principle of law.

A *cestui que trust* of a trust not executed by the Statute of

<sup>1</sup> 23 & 24 Victoria, ch. 38, § 7; Sugden on Powers (8th ed.) 20.

<sup>2</sup> See the authorities in note 1, page 369, above.

<sup>3</sup> *In re Whiston's Settlement* (1894), 1 Ch. 661.

<sup>4</sup> Williams, R. P. (18th ed.) 179, 180; 2 Wash. R. P. 186.

<sup>5</sup> *Smith v. Harrington*, 4 Allen, 566; *Robison v. Botkin*, 54 N. E. Rep. 916 (Ill.); *McDonald v. O'Hara*, 39 N. E. Rep. 642 (N. Y.); *Wooster v. Cooper*, 45 Atl. Rep. 381 (N. J. Ch.); *Nye v. Koehne*, 47 Atl. Rep. 215 (R. I.); *Lewin on Trusts*, 597, 598; *Hill on Trustees*, 253, 254; *Estabrook v. Earle*, 97 Mass. 302; *In re Davenport* (1893), 3 Ch. 424; *In re Rogers' Estate*, 36 Atl. Rep. 340 (Penn.); *Van Zandt v. Garretson*, 44 Atl. Rep. 221 (R. I.).



Uses cannot bring an action at law against the trustee while the trust is still open. But when the trust has been closed and settled, and the amount due the *cestui que trust* established and made certain, and nothing remains to be done but to pay over the money, such an action may be maintained.<sup>1</sup> And where the trust is a mere dry trust, and the *cestui que trust* is in possession of the premises, the same being real estate, although the trust be not executed by the Statute of Uses, yet, as against all the world but the trustee, or person claiming under him, the *cestui que trust* may maintain an action at law as the legal owner. And so a party purchasing of the *cestui que trust*, the *cestui que trust*, as above, being in possession of the premises at the time of the sale, may maintain an action at law against anybody but the trustee, or person claiming under him. No person can set up the legal estate against the equitable estate except the trustee or some person claiming under him.<sup>2</sup>

If there be an agreement for a trust, and the agreement be upon a valuable consideration, equity will always lend its assistance toward perfecting it. But if the agreement be voluntary, that is, without consideration, equity will not lend its assistance toward perfecting it.<sup>3</sup> But a court of equity sustains a voluntary settlement in trust, after creation, as between the donor and the trustee or *cestui que trust*.<sup>4</sup> But if the voluntary trust be for the exclusive benefit of the

<sup>1</sup> Johnson v. Johnson, 120 Mass. 465, 466; Upham v. Draper, 157 Mass. 292; Norton v. Ray, 139 Mass. 230; Minchin v. Minchin, 157 Mass. 267.

<sup>2</sup> Stearns v. Palmer, 10 Met. 35.

<sup>3</sup> Stone v. Hackett, 12 Gray, 230; Hill on Trustees, 83; Lewin on Trusts, 81 *et seq.*

For illustrations of imperfect voluntary trusts, which were consequently void as trusts, see Sherman v. New Bedford Sav. Bank, 138 Mass. 582; Scott v. Berkshire Co. Sav. Bank, 140 Mass. 157; Clark v. Clark, 108 Mass. 522.

<sup>4</sup> Stone v. Hackett, 12 Gray, 230; Viney v. Abbott, 109 Mass. 300; Sewall v. Roberts, 115 Mass. 262; Davis v. Ney, 125 Mass. 590; Perry v. Cross, 132 Mass. 454; Gerrish v. New Bedford Inst., 128 Mass. 159; Taylor v. Buttrick, 165 Mass. 549.

settlor, it may be revoked.<sup>1</sup> And a mere voluntary trust of personalty, consisting of money to be deposited by the trustee for the *cestui que trust* in a savings bank, and so deposited, is personal with the trustee, and is terminated by his death, and is, of course, revocable by the *cestui que trust* at any time. And, moreover, the *cestui que trust* may maintain an action at law for the fund, upon the trustee's decease, against the executor or administrator of the trustee.<sup>2</sup> But a voluntary settlement, when not for the exclusive benefit of the settlor, cannot be revoked by the settlor, unless there be a provision in the instrument for revocation. It is not for the exclusive benefit of the settlor, when the instrument contains limitations in favor of children, or of any person other than the settlor.<sup>3</sup> In *Taylor v. Buttrick*<sup>4</sup> the plaintiff, a woman, being about to be married, conveyed in trust for the benefit of herself for life, and upon her death without a will, to pay the principal to her children if any; and, in the event of her leaving no child surviving, to pay the principal to those entitled under the law of the Commonwealth. There was no clause of revocation. It was held not to be revocable. Even in England a conveyance in an ante-nuptial contract in favor of the children of the marriage and their issue is not revocable by either of the pair.<sup>5</sup>

<sup>1</sup> *Farrelly v. Ladd*, 10 Allen, 127; *Hunnewell v. Lane*, 11 Met. 163.

<sup>2</sup> *Farrelly v. Ladd*, 10 Allen, 127.

<sup>3</sup> *Keyes v. Carleton*, 141 Mass. 49 and cases cited; *Falk v. Turner*, 101 Mass. 494; *Sherwood v. Andrews*, 2 Allen, 79; *Sewall v. Roberts*, 115 Mass. 272; *Taylor v. Buttrick*, 165 Mass. 551; 10 Harv. Law Rev. 443, 444; *Lovett v. Farnham*, 169 Mass. 1; *Brown v. Mercantile Co.*, 40 Atl. Rep. 256 (Md.); *Wilson v. Anderson*, 40 Atl. Rep. 1096 (Penn.); *Stockett v. Ryan*, 34 Atl. Rep. 973 (Penn.).

<sup>4</sup> *Taylor v. Buttrick*, 165 Mass. 547.

<sup>5</sup> *McDonald v. Scott* (1893), App. Cas. 642. See also *Godfrey v. Poole*, 13 App. Cas. 497. See further, *Loring v. Whitney*, 167 Mass. 552; *Lawrence v. Lawrence*, 54 N. E. Rep. 918 (Ill.); *Rynd v. Baker*, 44 Atl. Rep. 551, 552 (Penn.); *Powell v. Powell* (1900), 1 Ch. 243; *Carney v. Carney*, 46 Atl. Rep. 264 (Penn.); *Smith v. Boyd*, 47 Atl. Rep. 816 (N. J. Ch.); *Neisler v. Pearsall*, 48 Atl. Rep. 8 (R. I.).

If a wife release her dower in her husband's land, in consideration that he shall transfer to her certain and specific personal property, the latter being no more than a fair equivalent for the value of the dower, the agreement, though made by the husband with the wife directly, is binding, and though not in writing; and the husband becomes thereupon a trustee, for the wife, of the specific personal property. If thereafter the husband becomes insolvent, he having been solvent at the time of the agreement, and after the condition of insolvency has arisen he then transfers the property to her, namely, the specific personal property, such transfer is valid as against the assignee in insolvency of the husband; and the fact that the wife had reasonable cause to believe her husband insolvent at the time of the transfer is immaterial. The wife, furthermore, could at any time have maintained a bill in equity against the husband for the specific performance of the agreement, and she was the equitable owner of the specific personal property from the time of the agreement.<sup>1</sup> The above doctrines were adjudicated in *Holmes v. Winchester*;<sup>2</sup> but in a later case<sup>3</sup> between the same parties, in which the subject-matter was land, the court declined to find a valid trust. Even in the case of real estate, if there be an agreement for the purchase and sale of real estate between two parties and the purchase money be paid, but the giving of the deed postponed merely for the convenience of the parties, and thereafter the vendor becomes insolvent, and then delivers the deed to the vendee or the agent of the vendee, who has reasonable cause

<sup>1</sup> *Holmes v. Winchester*, 133 Mass. 141. See further, *Haywood v. Cain*, 110 Mass. 277; *Robinson v. Trofitter*, 109 Mass. 479; *Niedsker v. Bonebrake*, 108 U. S. 66; *Atlantic Nat. Bank v. Taveney*, 130 Mass. 409; *Fowle v. Torrey*, 135 Mass. 87, and dissenting opinion, page 91 *et seq.*

As to a husband's conveying property directly to his wife being upheld in equity see *Jones v. Clifton*, 101 U. S. 228, but for the rule in Massachusetts see *Fowle v. Torrey*, 135 Mass. 89, 90.

<sup>2</sup> *Holmes v. Winchester*, 133 Mass. 141.

<sup>3</sup> *Holmes v. Winchester*, 135 Mass. 299; and see *Holmes v. Winchester*, 138 Mass. 540; *Phillips v. Frye*, 14 Allen, 38, 39, 40.

to believe the vendor insolvent, this shall not defeat the conveyance, as the vendor held the land in trust for the vendee; but the conveyance is valid.<sup>1</sup>

In the early part of this chapter we had a good deal to say about resulting trusts, and we think that it is convenient to say that in order to raise a resulting trust as between two or more persons, one of whom contributes only a portion of the consideration, there must originally have been an agreement that the party seeking to enforce the trust should receive some specific part of the property to be purchased, as, one-fourth or one-third, or else a life estate or tenancy for years, or a remainder in the whole or in a specific part.<sup>2</sup>

The Statute of Frauds requires that a trust of real estate shall be manifested by some writing.<sup>3</sup> But the declaration of trust, though required to be in writing, need not be between the parties; but any memorandum or letter, written by the party sought to be charged, no matter to whom written, is sufficient declaration of trust for a court of equity.<sup>4</sup> In Massachusetts, if the declaration of the trust be contained in a deed, it is inoperative if there be no delivery of the deed, although the deed be recorded; because no intention appears to create a trust except by deed, and that was never effectual.<sup>5</sup>

<sup>1</sup> *Nickerson v. Baker*, 5 Allen, 142.

<sup>2</sup> *McGowan v. McGowan*, 14 Gray, 119; *Buck v. Warren*, 14 Gray, 122, note; *Way v. Steele*, 2 Ves. & B. 238; *White v. Carpenter*, 2 Paige Ch. 241; *Sayse v. Townsend*, 15 Wend. 647; *Snow v. Paine*, 114 Mass. 526; *Fickett v. Dunham*, 109 Mass. 419. See further, *Blodgett v. Hildreth*, 103 Mass. 488.

<sup>3</sup> *Titcomb v. Morrill*, 10 Allen, 17; *Urann v. Coates*, 109 Mass. 585; *Lane v. Lane*, 117 Mass. 41; *Gerrish v. New Bedford Inst.*, 128 Mass. 161; *Clark v. Watson*, 141 Mass. 251; *Adams' Equity*, 288 note.

<sup>4</sup> *Lewin on Trusts*, 61-65; *Dale v. Hamilton*, 5 Hare, 369-382; s. c. 2 Phillips Rep. 266; *Montague v. Hayes*, 10 Gray, 609; *Adams' Eq.* 28; *Blodgett v. Hildreth*, 103 Mass. 484; *Carpenter v. Cushman*, 105 Mass. 417; *Dumphe v. Hayward*, 2 Cush. 429.

<sup>5</sup> *Loring v. Hildreth*, 170 Mass. 328.

As to trusts of personal property, these may be proved by word of mouth.<sup>1</sup> A mortgagee's interest in real estate being a chattel interest, a trust in respect thereto may be proved by parol. This principle applies not only when a mortgage of real estate is assigned with the mortgage note to a person "as trustee," but also when a person makes a mortgage of real estate, together with a mortgage note, to a party "as trustee," and there is no declaration of trust in writing. It is but a chattel interest, and the trust may be proved orally.<sup>2</sup> If a person holds property in his name "as trustee," this raises a presumption that he holds the same in trust.<sup>3</sup>

A *bona fide* purchaser from a trustee for a valuable consideration and without notice of the trust takes the property discharged of the trust.<sup>4</sup> The general principle as to notice is that a purchaser with notice from a purchaser without notice can protect himself under the first purchase, and a purchaser without notice from a purchaser with notice is also protected.<sup>5</sup> An exception to the latter of these propositions is said to exist in the case of a charitable use, and that the claim of the charity will be protected.<sup>6</sup> But if the

<sup>1</sup> Adams' Eq. 288 note; *Sturtevant v. Jaques*, 14 Allen, 527; *Davis v. Ney*, 125 Mass. 592; *Perkins v. Perkins*, 134 Mass. 445.

<sup>2</sup> *Sturtevant v. Jaques*, 14 Allen, 527; *Thacher v. Churchill*, 118 Mass. 108-110.

<sup>3</sup> *R. R. Co. v. Durant*, 95 U. S. 579; *Shaw v. Spencer*, 100 Mass. 389; *Smith v. Burgess*, 133 Mass. 512; *Am. Law Rev.*, February, 1880, pp. 113 *et seq.*, entitled "The Law of Collateral Securities"; *Hayward v. Cain*, 110 Mass. 273; *Loring v. Salisbury Mills*, 125 Mass. 151.

When the word "trustee" is a mere *designatio personæ*, see *Taylor v. Mayo*, 110 U. S. 330; *Bartlett v. Hawley*, 120 Mass. 92.

<sup>4</sup> *Atty.-Gen. v. Prop. of Meeting House*, 3 Gray, 62; *Merriam v. Hassan*, 14 Allen, 516; *Lewin on Trusts*, 725.

As to what is notice, see *Bancroft v. Cousen*, 13 Allen, 51, 52; *Trull v. Trull*, 13 Allen, 407; *Briggs v. Rice*, 130 Mass. 50; *Ashton v. Atl. Bank*, 3 Allen, 222, 223.

<sup>5</sup> 4 Kent's Com. 179; *Montague v. Dawes*, 12 Allen, 397; *Lewin on Trusts*, 726.

<sup>6</sup> *Lewin on Trusts*, 726.

party purchase from the trustee for a valuable consideration and without notice, and the consideration be a pre-existing debt, the purchaser takes subject to the trust, notwithstanding he takes without notice, and he is therefore liable to the *cestui que trust*. But this statement is qualified by the principle that the transfer will be good as against the *cestui que trust* even in the case in which the consideration was a pre-existing debt, provided there was anything by way of a new consideration, as, by giving up any old security or incurring any new risk.<sup>1</sup>

As to purchases by trustees of the trust property from themselves, the law is thus stated by Foster, J., in *Yeackel v. Litchfield*.<sup>2</sup> "The doctrine in equity is perfectly well settled both in England and America that executors and administrators, like trustees, who become buyers at sales made by themselves, acquire only an imperfect title which will always be set aside at the option of any of the parties interested in the property, on their application within a reasonable time. However free from fraud any particular transaction may be, and however ample may be the price paid, from this rule a court of equity never departs. But such a sale is not absolutely void; it cannot be set aside by a stranger, and it will be confirmed by acquiescence or unreasonable delay to avoid it. The purchase money must be refunded, and even expenditures for repairs and permanent improvements. In short, complete equity must be done between the parties. Where the party applying to set aside such a sale does not desire or is not entitled to have a reconveyance, the relief frequently granted is to order the estate put up again at a minimum price, of the sum for which it sold at the first sale. If no one will give more, the first sale is confirmed and the first pur-

<sup>1</sup> *Clark v. Flint*, 22 Pick. 243, 244; *Glidden v. Hunt*, 24 Pick. 226; *Ashton v. Atl. Bank*, 3 Allen, 222; *Clark v. Ely*, 2 Sandf. 166 (N. Y. Ch.); *Jewett v. Tucker*, 139 Mass. 576. See further, *Holland v. Cruft*, 20 Pick. 321, 338.

<sup>2</sup> *Yeackel v. Litchfield*, 13 Allen, 419, 420.

chaser held to his bargain; but if an advance is bid, he cannot have the estate." But "a purchase by an executor, administrator, trustee or other person holding a similar fiduciary capacity, of the estate which he himself sells," cannot be avoided at law "except for actual fraud."

## CHAPTER XXVII.

## POWERS.

POWERS existed even before the Statute of Uses; but they were mere directions to the trustee of the legal estate how to convey the estate,—that is, they were future uses to be designated by the person to whom the power was given; and a right might be reserved to the feoffor himself to revoke the uses wholly or partially.<sup>1</sup>

Powers are classified in different ways, which classifications are not upon one scheme; and the system of classification which we will first mention consists of a division into powers attendant or appurtenant, powers in gross or collateral, and powers simply collateral. Some writers use the expression “collateral” in place of the expression “simply collateral.” Powers appendant or appurtenant are so termed because they strictly depend upon the estate limited to the person to whom they are given, and the execution of the power diminishes that estate.<sup>2</sup> Powers collateral or in gross are powers given to a person who had an interest in the estate at the execution of the deed creating the power, or to whom an estate is given by the deed, but which enable him to create such estates only as will not attach on the interest limited to him.<sup>3</sup> We can illustrate these two kinds of powers as follows: If there be an estate limited to A for life, remainder to B in tail, remainder to A in fee, and A has a power to jointure his wife after his death, this power is collateral or in gross as to the estate for life, but appendant or appurtenant as to the remainder in fee. It may affect the latter, but can never attach on the

<sup>1</sup> Sugden on Powers (8th ed.) 4, 17.

<sup>2</sup> Sugden on Powers (8th ed.) 46.

<sup>3</sup> Sugden on Powers (8th ed.) 46, 47.



former.<sup>1</sup> A power simply collateral is so termed because "it is a power to a person not having any interest in the land, and to whom no estate is given, to dispose of or charge the estate in favor of some other person."<sup>2</sup> Another mode of dividing powers is into general, and special or particular. The donee of a general power can appoint to whom he pleases, and has the right to dispose of the entire estate or interest, which in real estate is, of course, the fee. A special or particular power is a power to dispose of the entire estate or interest, but the donee is restricted to a certain class of objects, as, for instance, the children of somebody, or to some particular person or persons.<sup>3</sup> Another mode of dividing powers is into powers operating under the common law, and powers operating under the Statute of Uses.<sup>4</sup>

The rule in equity is, that the having a general power of appointment, either by deed or will, subjects the property to the claims of the creditors of the donee of the power, provided he executes the power, even if he have no ownership or control over the property other than the control conferred by the gift of the power. But he must execute the power, or have done some act indicating an intention to execute it.<sup>5</sup>

<sup>1</sup> Sugden on Powers (8th ed.) 47.

<sup>2</sup> Sugden on Powers (8th ed.) 47.

A devise of land to an executor to sell gives a power coupled with an interest, and the estate passes to the executor in trust; whereas a devise that an executor shall sell, or that the land shall be sold by him, gives the executor merely a naked power of sale. *Bradt v. Hodgdon*, 48 Atl. Rep. 179 (Me.).

A trust to executors for the lives of people is not enlarged into a fee by the creation of a power of sale given the executors. *Chambers v. Sharp*, 48 Atl. Rep. 222 (N. J. Ch.).

<sup>3</sup> Sugden on Powers (8th ed.) 394; 1 Leake, 389.

<sup>4</sup> Sugden on Powers (8th ed.) 45.

<sup>5</sup> *Crawford v. Langmaid*, 171 Mass. 311; *Ryan v. Mahan*, 39 Atl. Rep. 893 (R. I.); *White v. Mass. Inst.*, 171 Mass. 96; *Emmons v. Shaw*, 171 Mass. 411; *In re Roper*, 39 Ch. Div. 487; *Clapp v. Ingraham*, 126 Mass. 200; *Brandeis v. Cochrane*, 112 U. S. 350-353; *In re Parkin* (1892), 3 Ch. 521; *Adams' Equity*, 99 note 1; 4 Kent's Com. 339.

In case the donee of a general power of appointment appoints by

A power conferred in a deed or in a will may be expressed in language having such latitude that an appointment under it might be bad; but the power is not void on that account. The power is good provided that its exercise be not contrary to the rules of law and be comprehended within the terms by which the power is created. In other words, a power is not invalid because the donee might under it create an invalid estate.<sup>1</sup> But a power cannot be conferred upon a person who may become able to execute it at a time which is, by possibility, too remote.<sup>2</sup>

The general rule is, but subject to such exceptions as reason and sound judgment render necessary, that the execution of a special power is to be treated as if the gift of the estate conferred by such execution were incorporated into the deed or will by which the power itself was created; so that the remoteness of the gift conferred by the execution of the power is to be determined by computing from the time that the deed or will which created the power took effect.<sup>3</sup> But a person having a special power to appoint by deed or will among his issue, appointed by will amongst his daughters who should survive him and attain twenty-four years of age; the appointment was held to be good, because his youngest daughter was more than three years old at the time of his death, so that the appointment was not too remote, as the class must be ascertained within twenty-one years from his death.<sup>4</sup>

A power to appoint by deed or will amongst children, will, the fund shall be paid to his executors; so that his creditors, if any, can present their claims. *Olney v. Balch*, 154 Mass. 322.

<sup>1</sup> *Hillen v. Iselin*, 144 N. Y. 380. See further, *Woodbridge v. Winslow* 170 Mass. 388.

<sup>2</sup> *In re Hargreaves*, 43 Ch. Div. 401.

<sup>3</sup> *Sugden on Powers* (8th ed.) 396; *Albee v. Holmes*, 114 Mass. 472; *Jeffries v. Jeffries*, 117 Mass. 188.

Sometimes a power to appoint amongst a class will be construed as a gift to the class, with a mere power to select amongst them. *In re Weekes' Settlement* (1897), 1 Ch. 289.

<sup>4</sup> *Van Brockdorff v. Malcolm*, 30 Ch. Div. 172. See further, *In re Coulman*, 30 Ch. Div. 188.

whether born or not at the time of the creation of the power, may be exercised by appointing to a child of the marriage for life, there being in fact but one child of the marriage, and then to go over to such persons as that child should appoint.<sup>1</sup> It has been said that this does not contravene the rule against perpetuities, because the donee of the original power, although a special power, has the entire control of the interest; and, therefore, the remoteness of an appointment under the original power is to be determined as of the time of its exercise, and not as of the time of its creation, for that, entire control continues.<sup>2</sup> We would suggest that it may be said that the control is specialized during a life which is in being at the death of the testator, or the execution of the deed, and is free from the expiration of that life. If, however, the original power be a special power, as above, to appoint amongst children of a marriage, and that be executed by giving a general power of appointment to a child, but to appoint only by will, the validity of the latter power, and of its exercise, must be determined as of the time of the creation of the original special power,<sup>3</sup> because the appointee under the special power, who is the donee of the general power, cannot appoint until his own death; so that no one has the entire control until the death of the appointee under the special power.<sup>4</sup> And, the original power being a special power, as above, an execution of it by giving a special power of appointment to a child unborn at the creation of the original power, is void, although the power to the child be to appoint either by deed or by will.<sup>5</sup>

If land be limited to the use of A for life, and after his

<sup>1</sup> *Bray v. Bree*, 2 Clark & Finnelly, 453, cited in Gray on Perp. § 524; *Thayer v. Rivers*, 179 Mass. 280, 289.

<sup>2</sup> Gray on Perp. § 524; *Wainwright v. Miller* (1897), 2 Ch. 255; *In re Gage*, *Hill v. Gage* (1898), 1 Ch. 498.

<sup>3</sup> Gray on Perp. § 526.

<sup>4</sup> Gray on Perp. § 526 a; 1 Leake, 407, 460.

<sup>5</sup> *Williamson v. Farwell*, 35 Ch. Div. 133.

death to such uses as B shall appoint, and during A's life B appoints to the heirs of A, A gets a fee simple, under the rule in Shelley's Case; and so, likewise, if the original limitation be to the heirs, and the appointment be to A for life. The limitation under the appointment is construed as if inserted in the place of the power, in the original instrument.<sup>1</sup>

A power of appointment implies a power of revocation, so that the donee of the power has the right to incorporate into the deed by which he executes the power a power of revocation; and, in general, upon a revocation the original power revives.<sup>2</sup>

In Massachusetts a general residuary clause in the will of the donee of a power will be held to be an execution of the power; so that there is no necessity that the will should in terms or by implication refer to the power.<sup>3</sup> This is not the English judicial rule, provided that there be other estate to satisfy the devise.<sup>4</sup> This has been changed in England by the statute 7 Wm. IV. and 1 Vict. ch. 26, § 27. This statute applies only to a general power of appointment.<sup>5</sup>

<sup>1</sup> 1 Leake, 376.

<sup>2</sup> 1 Leake, 413, 414.

<sup>3</sup> *Hassam v. Hazen*, 156 Mass. 93; *Amory v. Meredith*, 7 Allen, 398; *Fiske v. Fiske*, 173 Mass. 418; *Willard v. Ware*, 10 Allen, 267; *Talbot v. Field*, 173 Mass. 188; *Emery v. Haven*, 35 Atl. Rep. 940 (N. H.).

<sup>4</sup> *Amory v. Meredith*, 7 Allen, 398. See also, *Harvard College v. Balch*, 49 N. E. Rep. 543 (Ill.); *Ridgeley v. Cross*, 34 Atl. Rep. 469 (Md.); *Farlow v. Farlow*, 34 Atl. Rep. 837 (Md.); *Mason v. Wheeler*, 31 Atl. Rep. 426 (R. I.).

For a case where a person having a general power of appointment was held not to have appointed to himself, see *In re Thurston*, 32 Ch. Div. 508.

For a case in which the appointee made a gift, which was held not to pass property subsequently derived under the appointment, see *Lovett v. Lovett* (1898), 1 Ch. 86, 87.

<sup>5</sup> *In re Williams*, 42 Ch. Div. 96, 97. See further, *In re Cotton*, 40 Ch. Div. 41; *In re Marsh*, *Mason v. Thorne*, 38 Ch. Div. 630; *In re Gibbe's Settlement*, *White v. Randolph*, 37 Ch. Div. 143; *Airey et al. v. Bower*, 12 App. Cas. 263; *In re Mills*, *Mills v. Mills*, 34 Ch. Div. 186; *In re Jones*; *Greene v. Gordon*, 34 Ch. Div. 65; *Hall v. Bromley*, 35 Ch. Div. 648,

Equity will aid the defective execution of a power in certain cases. If there be a valuable consideration, equity will aid the defective execution of a power. But equity will not aid the defective execution in favor of mere volunteers, unless the appointor is considered especially bound by relationship to make provision for them, as for a wife, for children, but not for a husband, grandchild, or a parent.<sup>1</sup> But equity aids the defective execution of a power, in any case, only when the defect is of a formal character.<sup>2</sup>

As to the construction of powers, they are sometimes exclusive and sometimes non-exclusive. An exclusive power is when the power is to appoint among a class, as children, for instance, and is so phrased as to give the right to appoint exclusively to some. A non-exclusive power is where none of the class can be excluded. The chancery law is that when the power is non-exclusive, and an appointment of the whole property has been made *inter vivos*, to only some of the class, the appointment last made is bad, the others remaining good, at least where in default of appointment it is to go equally among the class; and the final amount is divided equally among all the class, both those appointed to and those not appointed to. The reason is that it is the last appointment which has evaded the right of the omitted member or members of the class. If an unsubstantial part has been given to some, that is called an "illusory" appointment.<sup>3</sup> But the right to make "illusory" appointments which shall satisfy non-exclusive powers has been created in England by the

653; *In re Hunt's Trusts*, 31 Ch. Div. 308; *Duguid v. Fraser*, 31 Ch. Div. 449; *Von Brockdorff v. Malcolm*, 30 Ch. Div. 172; *In re Wait, Workman v. Pitgrave*, 30 Ch. Div. 617; *In re Milner, Bray v. Milner* (1899), 1 Ch. 563; *In re Hartley, Williams v. Jones* (1900), 1 Ch. 152.

<sup>1</sup> 1 Leake, 421; *Adams' Equity*, 99, note; *In re Austis*, 31 Ch. Div. 596, 607.

<sup>2</sup> See the authorities in note 1, above.

<sup>3</sup> Sugden on Powers (8th ed.) 444; *Wilson v. Pigott*, 2 Ves. Jr. 351; *Young v. Lord Waterpark*, 13 Sim. 202; both cited in Sugden on Powers 450; Farwell on Powers, 294 *et seq.*

statute 1 Wm. IV. ch. 46.<sup>1</sup> This subject has undergone further legislation in England by the act of 1874.<sup>2</sup>

We have above said that one of the classifications of powers is that of powers operating under the Statute of Uses and common-law powers. If it be the intention of the testator or grantor that the execution of the power shall operate under the Statute of Uses, the execution of the power raises a use in the party whom the donee of the power appoints to have the estate. Thus, if the grant or devise be to A and his heirs, to such uses as he or another shall appoint, and the appointment be to B and his heirs, there is a use raised in B, and B takes the legal estate.<sup>3</sup> And so, if he appoints to B and his heirs, to the use of C and his heirs, the Statute of Uses executes the use in B, and C has an equitable estate, it being the case of a use upon a use.<sup>4</sup> And so if the grant or devise be to the use of A and his heirs, to such uses as he or another shall appoint, and the appointment be to B and his heirs, B has an equitable estate, for it is a use upon a use.<sup>5</sup>

The question whether a power shall operate as a common-law power or shall operate under the Statute of Uses is determined by the intention of the creator of the power. And where there is no sufficient evidence of an intention that the power shall operate under the Statute of Uses, it is then a common-law power. In such a case, if A be the donee of the

<sup>1</sup> Sugden on Powers (8th ed.) 449, 450. See further, as to exclusive and non-exclusive powers, *McGibbon v. Abbott*, 10 App. Cas. 658 *et seq.*; *In re Ashton*, *Ingram v. Papillon* (1897), 2 Ch. 574; *In re Ashton*, *Ingram v. Papillon* (1898), 1 Ch. 142.

<sup>2</sup> Elphinstone's and others' ed. of Goodeve, R. P. (4th ed.) 312.

<sup>3</sup> Tudor's Lead. Cases (3d ed.) 348; Sugden on Powers (8th ed.) 146, 147, 197, 198, 199; Sugden on Powers (ed. of 1856), vol. I. pp. 171, 175, 240, 242.

<sup>4</sup> Tudor's Lead. Cases (3d ed.) 348, 353; Sugden on Powers (8th ed.) 146, 190, 191, 197, 457; 1 Leake, 375; Gilbert on Uses (Sugden's ed.) 351, note; Williams, R. P., 296 and note; 2 Wash. R. P., 304, 305, 321, 336; 4 Greenleaf's Cruise, 220; 2 Crabb, R. P. 725; 2 Flint. R. P. 545; Co. Litt. 271 b (Butler's note) 231, § 3, p. 4; 1 Preston's Abstr. 310.

<sup>5</sup> Sugden on Powers (8th ed.) 149; 1 Leake, 375.

power and he appoints to B and his heirs to the use of C and his heirs, there is no use raised in B by the execution of the power, and C takes the legal estate under the Statute of Uses.<sup>1</sup> The deed by which the power is executed is called in England a bargain and sale, but it really operates at common law; so that in the above case C takes the legal estate.<sup>2</sup>

<sup>1</sup> 1 Gray's Cases on Prop. 533, note; Sugden on Powers (8th ed.) 45, 46, 146, 148, 196, 199; Sugden on Powers (ed. of 1856) 240, 242; 4 Kent's Com. 315, 323; Gilbert on Uses (Sugden's ed.) 351, note.

<sup>2</sup> Elphinstone's and others' 4th ed. of Goodeve, R. P. 299.

## CHAPTER XXVIII.

## COVENANTS.

IN Chapter VIII. we discussed the subject of covenants contained in leases for years, and we will now take up the subject of covenants contained in deeds of the freehold estate; and, practically speaking, these deeds are deeds of the fee.

Covenants are divided into two great classes: covenants *in præsenti* and covenants *in futuro*. Covenants *in præsenti* are broken, if at all, as soon as they are made. Upon the execution and delivery of the deed they are then and there broken provided that there be a breach of them at all. They, therefore, do not run with the land, for the right to recover for breach is a mere chose in action. That they do not run with the land means that the right does not pass to the grantee's heirs or to the grantee of the grantee, but the right is a mere debt or chose in action, and passes, of course, to the grantee's executor or administrator in case of his death.

Covenants *in præsenti*, common in every-day deeds, are these three: covenant of seisin, covenant of good right to convey, covenant against incumbrances. The covenants of seisin and of good right to convey are substantially the same in effect, but it is said that if a tenant for years should convey the land in fee with these two covenants, the covenant of seisin would be broken, because, of course, he has not the seisin, but that the covenant of good right to convey would not be broken.<sup>1</sup> The covenant of seisin is a covenant that the grantor has the actual seisin. The result is that if a disseisor convey with this covenant there is no breach thereof,

<sup>1</sup> Crocker's Notes on Common Forms (3d ed.) 96, 97.



although he has not the true title, but he certainly has the actual seisin.<sup>1</sup> Now, in some jurisdictions some of these three covenants run with the land and are, therefore, *in futuro* covenants,<sup>2</sup> but generally in the United States these three covenants are *in præsenti* covenants, and therefore do not run with the land.

In an early chapter we showed that the fee simple is an estate of inheritance, and that it is free from all conditions, qualifications, and restrictions of every kind. We there gave a list of fees which are less than the pure fee simple or fee simple absolute, and in this list we included the conditional fee, or, as it is often called, the fee upon condition. Suppose, now, that X, the owner of land in fee simple, conveys the land to A and his heirs, and incorporates into the deed a provision in terms of strict condition subsequent. The estate thus created is a conditional fee, or fee upon condition. Suppose A, the grantee, conveys the land to B and his heirs, and incorporates into that deed a covenant against incumbrances. Now, the existence of this condition subsequent is not an incumbrance, because it is not a pure fee simple which A, the grantor, has, but it is a conditional fee which A, the grantor, has. The result is that what he conveys to B is a conditional fee and there is no incumbrance upon that conditional fee. Therefore the covenant against incumbrances is not broken.<sup>3</sup>

Coming now to prospective covenants, covenants *in futuro*,

<sup>1</sup> Crocker's Notes on Common Forms (3d ed.) 97; *Cornell v. Jackson*, 3 Cush. 508, 509; *Slater v. Rawson*, 1 Met. 455, 456; *Bickford v. Page*, 2 Mass. 455; *Maupin on Marketable Title*, § 108. For the rule in some of the states see, however, 2 Wash. R. P. 64 *et seq.*; *Maupin on Marketable Title*, §§ 108-113.

<sup>2</sup> 2 Wash. R. P. 649 *et seq.*; *Maupin on Marketable Title*, §§ 108-113; *Tied. R. P.* § 852.

<sup>3</sup> 2 Wash. R. P. 659; *Jeffries v. Jeffries*, 117 Mass. 184, 186, 187. From a comparison of *Locke v. Hale*, 165 Mass. 20; *Cassidy v. Mason*, 171 Mass. 507, and *Clapp v. Wilder*, 176 Mass. 332, we are led to think that this rule has not been changed in Massachusetts.

these are not broken as soon as made, because they are prospective or *in futuro*, and therefore they run with the land. The covenant of general warranty, which we shall call, as others do, the covenant of warranty, and the covenant for quiet enjoyment are in this class, and they are often said to be substantially the same thing.<sup>1</sup> While the covenant of warranty is very commonly found in the Massachusetts deed of the freehold, the covenant for quiet enjoyment is not used at all. But the covenant for quiet enjoyment is often expressed in Massachusetts, and elsewhere, in leases for years, and is often implied in these. The covenant of warranty is a covenant of title, and if there be a breach of the covenant for quiet enjoyment this, too, may be a covenant of title, because the party claiming under it has suffered an eviction by paramount title, or what is regarded in law as the equivalent of an eviction; and, furthermore, it is held that if the lessor of a lease for years causes the lessee's chimneys to smoke, this is a breach of the covenant for quiet enjoyment.<sup>2</sup> In the case of a conveyance of a freehold estate containing a covenant of warranty, it is easily perceived that the only way in which it can run with the land is to run in favor of whoever shall at any given time be the owner of the land. It results that it is only the benefit of the covenant which can run with the land. But, take the case of a lease for years, both the benefit and the burden run with the land. Thus, if there be a lease for years by the owner of a piece of land and he sells his reversion, the burden of the covenant for quiet enjoyment runs against the assignee of the reversion, and the benefit runs in favor of those claiming under the lease; and so, if the assignee of the reversion, and the same is true of the lessor himself, inflicts a structural injury upon the house leased, he is liable for the damage, as it constitutes a breach of the covenant for quiet enjoyment.<sup>3</sup>

<sup>1</sup> 2 Wash. R. P. 661, 664.

<sup>2</sup> *Tebb v. Cave* (1900), 1 Ch. 642.

<sup>3</sup> *Railway Co. v. Anderson* (1898), 2 Ch. 394.

In order to constitute a breach of the covenant of warranty, it is not necessary that there should be an actual ouster or eviction from the premises, but only what is regarded in law as the equivalent of an ouster or eviction. We will now give some illustrations of what is, in law, an equivalent. But first, if a man owning land mortgages it, what is left in him is called an equity of redemption. Now, if a man owns an equity of redemption, and conveys the land with a covenant of warranty, but fails to except out the mortgage, and the party entitled under the covenant voluntarily pays off the mortgage, this is the equivalent of an ouster or eviction, and is a breach of the covenant.<sup>1</sup> And so, if there has been an entry for foreclosure and the certificate filed, this is a breach of the covenant.<sup>2</sup> Another illustration is this: The owner of an equity of redemption conveyed it with a covenant of warranty, but unfortunately his equity of redemption was subject to an attachment on mesne process. Thereafter the creditor procured a judgment in the action, took out execution, levied it upon the equity of redemption, and sold it at sheriff's sale. The then owner of the property claiming under the covenant of warranty, who was a subsequent grantee of the covenantee, bought in the property at the auction sale. It was held that this was a breach of the covenant of warranty.<sup>3</sup>

The Massachusetts statutes provide that after a man's estate has been settled and after the time has elapsed under the statute of limitations for suing the executor or administrator, if any debt arises, the heirs, devisees, legatees, or next of kin shall be liable for that debt to the extent of assets which they have received, but the statute also provides that the action must be brought within one year from the time that the cause

<sup>1</sup> *Kramer v. Carter*, 136 Mass. 509; *Maupin on Marketable Title*, § 148; *Handy v. Aldrich*, 168 Mass. 34; *Beasley v. Phillips*, 50 N. E. Rep. 488; *Harrington v. Beane*, 36 Atl. Rep. 986 (Me.).

<sup>2</sup> See the authorities in note 1, above. See the opinion in *Kramer v. Carter*, 136 Mass. 509.

<sup>3</sup> See the opinion in *Kramer v. Carter*, 136 Mass. 509.

of action accrues.<sup>1</sup> A owned a piece of land in fee, and this was subject to one of those equitable easements, heretofore explained, for land had been divided up and conveyed away under some general scheme or plan. The equitable easement to which this land was subject was that only buildings of a certain character should be built upon the land, and that a part of the land should not be built upon, and so forth. A conveyed the land to B in fee, and the deed contained the ordinary and common covenants against incumbrances and of warranty. B conveyed with the same covenants to C in fee, and C with the same covenants to D in fee. D made a contract with E to convey the land to him. In a suit in equity between D and E, the court ordered D to convey and to reduce the contract price on account of this incumbrance upon the title. Thereupon D sued his grantor, C, upon the covenant against incumbrances and recovered damages, and C recovered from B, his grantor, upon the same covenant; and within one year after B paid the judgment recovered against him, B brought a bill in equity against the heirs, devisees, etc., of A. A's estate at the time this bill in equity was brought had been settled, and claims against his administrator or executor had been barred by the statute of limitations. The court held that there could be no recovery for the breach of the covenant against incumbrances, because that was broken when made, and that the debt accrued at that time, but that there could be a recovery for the breach of the covenant of warranty, and that the covenant of warranty was broken when B, the plaintiff, paid C the judgment recovered by him.<sup>2</sup> Thus we see another illustration of what is regarded in law as the equivalent of an eviction so as to constitute a breach of the covenant of warranty.

In many states heirs and devisees are liable for breach of a

<sup>1</sup> Mass. Rev. Laws, ch. 141, §§ 26, 27.

<sup>2</sup> *Kramer v. Carter*, 136 Mass. 504; *Ayling v. Kramer*, 133 Mass. 12; *Kennedy v. Owen*, 136 Mass. 201.

covenant of warranty to the extent of assets received by them, and they need not be expressly named in the deed.<sup>1</sup> We have shown in a previous chapter that one of the reasons for the rule that the heirs of a testator preferably take by descent rather than by purchase is, that under the old law purchasers were not liable for the parties' debts, and, that even the heir, that is, one taking by descent, was not liable for the debt unless the debt were a specialty debt (a debt under a sealed instrument), and unless the heir were expressly mentioned in the instrument. So that under the old law, in order to hold an heir liable for the breach of his ancestor's covenant of warranty, he must be expressly mentioned in the deed.<sup>2</sup> It will be observed that the class of statutes just above referred to do not require that the party chargeable shall be mentioned.

In *Morse v. Aldrich*<sup>3</sup> we have a case which carries us away from the covenant of warranty, and we will devote some time to developing the subject of *in futuro* covenants, so that we take a wider view of them than if we confined ourselves to the covenant of warranty. In *Morse v. Aldrich*, *supra*, a man conveyed a part of his land and created an easement in his retained land for the benefit of the granted land. Thereafter he entered into a covenant concerning the same. It was held that the heirs, devisees, or grantees of the retained land were liable in damages for any future breach of this covenant occurring after they had acquired their possession. In other words, this covenant ran with the granted land for its benefit, and against the retained land, running, as it ought to do, in both directions, and further, that it was not necessary that the words "heirs" or "assigns" should be used.

<sup>1</sup> Maupin on Marketable Title, § 139; *Newark Co. v. Harrington*, 42 Atl. Rep. 417 (N. J.); *Harrison Bank v. Culbertson*, 47 N. E. Rep. 13 (Ind.); *Sawyer v. Jeffs*, 47 Atl. Rep. 416 (N. H.).

<sup>2</sup> Maupin on Marketable Title, § 139.

<sup>3</sup> *Morse v. Aldrich*, 19 Pick. 449. See further, 2 Gray's Cases on Prop. 446; 4 Kent's Com. (14th ed.) 480, notes; *Hottell v. Farmers' Ass'n*, 53 Pacific Rep. 327 (Col.).

In *Hogan v. Barry*<sup>1</sup> a man conveyed a part of his land, and the deed contained a provision that a strip of the retained land should never be built upon. Thereafter this action arose between the then owner of the granted land and a party who had bought the retained land. It was held that whether the provision was in terms of strict covenant or whether in terms of mere contract was immaterial, for that the covenant or quasi covenant ran with the land in both directions, and created an easement in the retained land for the benefit of the granted land, and that the words "heirs" or "assigns" were not necessary as connected either with the grantor's name or with the grantee's name. This was not an equitable easement, as it has sometimes been taken to be, but was a common law easement.<sup>2</sup> In *Rogers v. Hosegood*<sup>3</sup> we have a case which is the converse of *Hogan v. Barry*, *supra*. In that case there was a provision in the deed that buildings of a certain character only should be erected upon the granted land, and the deed in this case in terms stated that the provision was for the benefit of the retained land. This was held to create an easement in the granted land for the benefit of the retained land.

Ordinarily an easement in some way or other restricts the use which the owner of the land would otherwise be able to make of his land. Thus, he must not build so as to interfere with the light and air which may come into his neighbor's windows, he must allow his neighbor to go over a part of his land, and must not obstruct or interfere with the right of way; and other illustrations are numerous. But there are easements in land which involve the doing of some positive

<sup>1</sup> *Hogan v. Barry*, 143 Mass. 538. See further, *Ladd v. Boston*, 151 Mass. 585; *Bronson v. Coffin*, 108 Mass. 175; *Jones v. Parker*, 163 Mass. 568; 4 Kent's Com. (14th ed.) 480, notes; *Brown v. O'Brien*, 168 Mass. 484; *Morton v. Thompson*, 38 Atl. Rep. 88 (Vt.); *Clements v. Putnam*, 35 Atl. Rep. 181 (Vt.); *Landell v. Hamilton*, 34 Atl. Rep. 663 (Penn.); *Allen v. Hamilton*, 34 Atl. Rep. 667 (Penn.).

<sup>2</sup> *Ladd v. Boston*, 151 Mass. 585; *Bronson v. Coffin*, 108 Mass. 175.

<sup>3</sup> *Rogers v. Hosegood* (1900), 2 Ch. 388.

act by the owner of another piece of land. These have often been called spurious easements; thus, an easement requiring the owner of land to maintain a fence between the granted land and the retained land, or to construct and maintain a way over the granted land for the benefit of the retained land,<sup>1</sup> or to pay money. Now, in the New England states deeds of land are almost invariably deeds poll, which are deeds which only the grantor signs and seals. But a deed of indenture is both signed and sealed both by the grantor and the grantee, and it is so called because in old times the two parts were on one parchment, and then these two parts were cut apart in a zigzag fashion, so that they might correspond to each other. These two parts of an indenture are not an original and a copy, but they are duplicate originals. Now, it is held in Massachusetts, in *Kennedy v. Owen*,<sup>2</sup> that a provision in a deed poll that the grantee, his heirs and assigns, shall maintain a fence between the granted land and the retained land does not run with the land at law, that is, it does not bind the grantee's heirs or assigns, for that it is no covenant at all, not being either signed or sealed by the grantee; but this case shows that in Vermont and New Hampshire a different rule is adopted. Now, in equity a different rule is adopted even in Massachusetts. In *Whittenton Manfg. Co. v. Staples*,<sup>3</sup> which was a case of a bill in equity, there was a deed poll which conveyed a mill site, and there was a provision in the deed that the grantee should from time to time pay a certain portion of the expense of flowage damages incidental to the running of this mill and other mills in that vicinity. The court held that this obligation to pay money bound the granted land into whosoever hands it should come, in other words, that it ran with the

<sup>1</sup> *Kennedy v. Owen*, 136 Mass. 202; *Martin v. Drinan*, 128 Mass. 515. See further, 4 Kent's Com. (14th ed.) 480, notes.

<sup>2</sup> *Kennedy v. Owen*, 136 Mass. 202.

<sup>3</sup> *Whittenton Manfg. Co. v. Staples*, 164 Mass. 319. See further, 9 Harv. Law Rev. 352; 4 Kent's Com. (14th ed.), 480, note; *Trudeau v. Field*, 38 Atl. Rep. 164 (Vt.); *Heald v. Ross*, 47 Atl. Rep. 575 (N. J. Ch.).

land in equity, but that it did not bind the owner of the land from time to time as a personal obligation, but only bound him as owner.

Returning now to the covenant of warranty, suppose that a breach of the covenant occurs after the covenantee's (grantee's) death, who can bring the action? The answer is his heir, who is in possession of the land by descent, or his devisee, who is in possession under his will. But now suppose that the grantee (covenantee) has conveyed the land by a deed, the covenant running with the land runs in the assignee's favor just exactly as it may run, as above, in favor of the heir of the deceased;<sup>1</sup> and the next question is, what sort of a deed is required by the grantee (covenantee) to make this covenant run in favor of his grantee? The answer is, a mere quitclaim deed is sufficient,<sup>2</sup> and so if the grantee (covenantee) mortgages the land and the mortgage is foreclosed under the power of sale contained in the mortgage, the purchaser at the mortgage sale does by the deed to him acquire the right under the covenant of warranty. In other words, it runs with the land in his favor;<sup>3</sup> and so, if the land be taken on execution by a creditor, the covenant runs with the land in favor of the judgment creditor, if the sheriff has set the land off to him under the execution, and in favor of the purchaser at the sheriff's sale, if the land is sold under the execution.<sup>4</sup>

No party claiming under a covenant of warranty can maintain an action for its breach, if the land has passed to a subsequent purchaser, until he has indemnified the person injured by the breach; because otherwise the covenantor might be exposed to pay twice over.<sup>5</sup> But it is said that if the subse-

<sup>1</sup> Crocker's Notes on Common Forms (3d ed.) 95.

<sup>2</sup> 2 Sugden on Vendors, 708, note; 4 Greenleaf's Cruise, 375, 381; 2 Wash. R. P. 658, 659; Cornell v. Jackson, 3 Cush. 506; Farwell v. Rogers, 99 Mass. 34.

<sup>3</sup> 1 Jones, R. P. § 935; Maupin on Marketable Title, § 160.

<sup>4</sup> White v. Whitney, 3 Met. 81; Baker v. Bradt, 168 Mass. 58, 60.

<sup>5</sup> 2 Wash. R. P. 663.



quent party executes a deed of release to the prior party, such prior party may sue the covenantor for breach of the covenant if there has been one.<sup>1</sup>

The principle of vouching in is an important practical one. Suppose that the party in possession of the land is sued by a person who claims that he has got a better title: should judgment be recovered against the defendant, who, if it be a writ of entry, is called the tenant, the plaintiff being called the demandant, this tenant or defendant having tried to show that he has a better title would now have to change base and try to prove, in an action against the warrantor, that the warranted title was defective. This is obviated by vouching in the warrantor, and this is simply effected by writing him a note, asking him to come in and defend the action, and he in turn may at the same time vouch in some warrantor who is senior to himself in the chain of title. Now, the judgment recovered by the demandant in the action is conclusive upon the parties vouched in, so that the tenant or defendant has no burden of proof, for all he has to do in suing the warrantor is to show that he was vouched in and is, therefore, bound by the judgment recovered.<sup>2</sup>

In Massachusetts and in some other states, if A convey to B with a covenant of warranty, and later A acquires the paramount title, this paramount title enures to B by way of estoppel.<sup>3</sup> Now, suppose that B has gone into the possession

<sup>1</sup> *Wheeler v. Sohler*, 3 Cush. 219, 221.

<sup>2</sup> *Chamberlain v. Preble*, 11 Allen, 370, 373; *Teague v. Whaley*, 50 N. E. Rep. 41 (Ind.); *Ladd v. Kuln*, 56 N. E. Rep. 671 (Ind.).

<sup>3</sup> *White v. Patten*, 24 Pick. 324; *Knight v. Thayer*, 125 Mass. 27; *Ayer v. Phila. Co.*, 157 Mass. 57; *Ayer v. Phila. Co.*, 159 Mass. 84; *Bigelow on Estoppel* (4th ed.) 377-383, 405-437, 423, 424, 434, 435, 436; *Somes v. Skinner*, 3 Pick. 52; *Blanchard v. Ellis*, 1 Gray, 201; *Kane v. Lodor*, 38 Atl. Rep. 968 (N. J.); *Bradford v. Burgess*, 38 Atl. Rep. 975 (R. I.); *Hamill v. Inventor's Co.*, 37 Atl. Rep. 775 (N. J.); *Kappes v. Rutherford Ass.*, 46 Atl. Rep. 218 (N. J. Ch.); *Crocker's Notes on Common Forms* (3d ed.) 109 *et seq.*; *Walker v. Arnold*, 44 Atl. Rep. 351 (Vt.); *Johnson v. Bedwell*, 43 N. E. Rep. 246 (Ind.); *Maher v. Brown*, 56 N. E. Rep. 181 (Ill.); *McElroy v. McLeay*, 45 Atl. Rep. 898 (Vt.).

of the land, and that A, having acquired the paramount title, brings a writ of entry to get him out: B may set up in that action his deed with covenant of warranty by way of rebutter, and this to avoid circuitry of action, for B is not required to bring a cross action against A, for breach of the covenant of warranty.<sup>1</sup> Suppose now that after acquiring paramount title, A conveys to C, who takes with notice of the prior deed to B; this title enures from C to B. This enuring of the title from C to B has created great difficulty in the minds of some writers upon this subject, but it is the law of Massachusetts and of some other states. If, however, C takes without notice, he has the better title. But if the deed of B be recorded in the registry of deeds, this is constructive notice.<sup>2</sup> It is evident that in examining the title of land in the registry of deeds, it would be necessary to find out whether A had at perhaps some remote time, under a different chain of title, conveyed the land to B with a covenant of general warranty.

The doctrine that the title enures by virtue of the covenant of general warranty is extended also to cases in which the deed contains some recital, or admission, indicating an intent to convey a certain estate.<sup>3</sup>

A release by an heir of his expectancy is void at law.<sup>4</sup> He certainly has no title to the land which he afterwards acquires. But even under the ancient law, a release by the heir accompanied by a covenant of warranty to a disseisor of the ancestor was good, although the ancient covenant of warranty had less scope than has the modern covenant of warranty.<sup>5</sup> But, in equity, the conveyance of a

<sup>1</sup> Bigelow on Estoppel (4th ed.) 435, 436.

<sup>2</sup> See the authorities in note 3, page 395, above.

<sup>3</sup> *Van Rensselaer v. Kearney*, 11 How. 320; *Rawle on Covenants* (5th ed.) §§ 245, 247, 251, 255.

<sup>4</sup> *Rawle on Covenants* (5th ed.) § 254; *Cass v. Brown*, 44 Atl. Rep. 86 (N. H.); *Binns v. Dazey*, 44 N. E. Rep. 644 (Ind.).

<sup>5</sup> *Co. Litt.* 265 a; *Rawle on Covenants* (5th ed.) § 255; *Bigelow on Estoppel* (4th ed.) 430.

mere expectancy is good, provided that it is upon a valuable consideration.<sup>1</sup>

In *Russ v. Alpaugh*,<sup>2</sup> a man had conveyed land with a covenant of warranty. He was a tenant by the curtesy, so that the land belonged to his wife and in fee simple. After the death of himself and his wife, their child claimed the land as against the grantee, claiming it by descent from his mother. Assets had descended to this child from the father, but the father's estate had not at the time been settled. It was held that the heir, the child, was not barred, estopped, or rebutted to set up as against the grantee, the independent title acquired from his mother.

In *Slater v. Rawson*,<sup>3</sup> it was held that in an action on a covenant of warranty by a grantee of the covenantee, if it appear in the evidence offered by the plaintiff, that when the deed with warranty was delivered, the defendant was not seised of the land and had not its possession, the action cannot be maintained. It is left in doubt whether the defendant would be estopped to show this himself. Now, the reason why the action cannot be maintained, is because, in order for the assignee, the plaintiff, to recover, there must be

<sup>1</sup> *In re Lennig's Est.*, 38 Atl. Rep. 466 (Penn.); *Brown v. Brown*, 34 Atl. Rep. 490 (Conn.); *Fuller v. Parmenter*, 47 Atl. Rep. 1079 (Vt.).

<sup>2</sup> *Russ v. Alpaugh*, 118 Mass. 369. See further, *Whitson v. Grosvenor*, 48 N. E. Rep. 1018 (Ill.). In a previous chapter, we have discussed the subject of the ancient lineal and collateral warranty. Lineal warranty did not bar unless assets descended. Collateral warranty barred even though no assets descended. But under the equity of the Statute of Gloucester (6 Edw. I. ch. 3) if a tenant by the curtesy conveyed the land with a covenant of warranty, the heir was not barred unless assets descended from the tenant by the curtesy, although this was collateral warranty. But if assets descended the heir was barred to the extent of such assets as had descended. *Rawle on Covenants* (5th ed.) § 238; *Co. Litt.* 365 a-366 b; 2d Inst. 292.

<sup>3</sup> *Slater v. Rawson*, 1 Met. 450; *Slater v. Rawson*, 6 Met. 444; *Bigelow on Estoppel* (4th ed.) 435-437. This principle is not followed in all jurisdictions, requiring seisin or possession in the covenantor to make the covenant run with the land. *Rawle on Covenants* (5th ed.) §§ 232-236; 8 Harv. Law Rev. 178, 179.

a privity of estate for the covenant to run with the land in his favor, and if the grantor were not seised or possessed of the land, there could not be a privity of estate, but as between the covenantor and the covenantee there would in any event be a privity of contract, and that would be sufficient to enable the covenantee to sue and recover, but it would not avail the assignee of the covenantee. It is important to notice that writs of entry brought by an assignee of the grantee are local actions, and care must be taken in bringing one of them to bring it in the county in which the land lies. They are local actions when brought by the assignee, because of this matter of privity of estate.<sup>1</sup>

We have hitherto considered the covenant of warranty upon the supposition that the grantee has succeeded in entering, but there are cases in which the grantee could not get the possession of the land after the delivery of the deed to him, and this inability to get the possession is a breach of the covenant of warranty;<sup>2</sup> and it has been held that if there be a tenant for years in possession, and the grantee cannot get in on that account, it is a breach of the covenant of warranty.<sup>3</sup>

There is nothing more common than to introduce a covenant in some such words as these: that the grantor covenants to warrant and defend as against all persons claiming by, through, from or under himself, and none other. Now, these superadded words qualify the covenant of warranty and make the covenant what is called a qualified warranty, and reduce the deed to the quality of a mere quitclaim deed; and this is true even though the operative words of the deed be not such as remise, release, and forever quitclaim, but be the full operative words, give, grant, bargain sell, and convey,<sup>4</sup> words which we have considered in a previous chapter.

<sup>1</sup> *Clark v. Scudder*, 6 Gray, 122; *Davis v. Parker*, 14 Allen, 94, 98.

<sup>2</sup> 1 Jones, R. P. §§ 915, 916; *Maupin on Marketable Title*, § 146.

<sup>3</sup> *Maupin on Marketable Title*, §§ 125, 146; 1 Jones, R. P. § 915.

<sup>4</sup> *Crocker's Notes on Common Forms* (3d ed.) 112; *Bennett v. Davis*, 38 Atl. Rep. 372 (Me.); *Doane v. Wilcutt*, 5 Gray, 328; *Comstock v.*

But there may be a covenant in the form of a general warranty, which covenant will not amount to a covenant of general warranty, and the deed will be a mere quitclaim deed, because the grantor has not undertaken to convey the land itself, but only his right, title, and interest in the land. In such a case, the grantor is not liable for a breach of the covenant in case of an eviction of the grantee. It is a mere quitclaim deed.<sup>1</sup> Secondly, he is not estopped to set up a title subsequently acquired by him.<sup>2</sup> Now, these two propositions are not the law everywhere in the United States, but are the law in Massachusetts, and the latter of them has been sustained by the Supreme Court of the United States in a case which came up from Texas, and it does not appear to be so held by the Supreme Court of the United States as a local rule of Texas, but as a general rule.<sup>3</sup> But suppose that the grantor conveys all his right, title, and interest in the land, or all of his interest, and has conveyed the land itself to somebody else, even perhaps by warranty deed. One would say that he had no right, title or interest to convey perhaps, but the law is that the second grantee has the title as against the prior deed, provided that the second grantee takes without notice of the prior deed. But if the prior deed be recorded in the registry of deeds, this of course is constructive notice.<sup>4</sup> But there are cases

Smith, 13 Pick. 116; *Miller v. Ewing*, 6 Cush. 34, 40, 41; *Wight v. Shaw*, 5 Cush. 56, 63.

<sup>1</sup> *Hoxie v. Finney*, 16 Gray, 332; *Allen v. Holton*, 20 Pick. 459; *Hubbard v. Apthorp*, 3 Cush. 419; *Adams v. Cuddy*, 13 Pick. 463; *Jamaica Pond Corp. v. Chandler*, 9 Allen, 159; *Cook v. Farrington*, 10 Gray, 70; *Bank v. Trust Co.*, 123 Mass. 331; *Leonard v. Adams*, 119 Mass. 367; *Merritt v. Harris*, 102 Mass. 326, 328; *Sweet v. Brown*, 12 Met. 175; *Ayer v. Phila. Co.*, 159 Mass. 87.

<sup>2</sup> 2 *Smith's Lead. Cas.* (8th ed.) 821, 852; *Haurick v. Patrick*, 119 U. S. 156; *Tied. R. P.* § 858; 2 *Wash. R. P.* 475, 476; *Bigelow on Estoppel* (4th ed.) 394, 395, 415.

<sup>3</sup> *Haurick v. Patrick*, 119 U. S. 156, 175, 176.

<sup>4</sup> *Woodward v. Sartwell*, 129 Mass. 214, 215, 219; *Moelle v. Sherwood*, 13 U. S. Supreme Court Reporter, 426, 429; *U. S. v. Land Co.*, 13 U. S. Supreme Court Reporter, 464; *Clarke v. Minot*, 4 Met. 352; *Flynt v.*

in which a man has conveyed the land, and later has conveyed a large tract of land in a vague and general way by such words as, "all my property, estates," etc., in a certain locality, and it is held that the prior deed is good as against the second one, even though the second grantee takes without notice.<sup>1</sup>

It is a great principle of equity law that if there be a covenant by the grantee which does not run with the land at law, yet that it will run with the land in equity, as against a grantee of the grantee, if he had notice, and the word "assigns" is not necessary, and recording in the registry of deeds is constructive notice.<sup>2</sup>

If there be a deed of land containing covenants of the grantor, and a mortgage be taken back to secure the purchase-money in whole or in part, and the mortgage deed contains the same covenants as those contained in the deed made by the vendor, the mortgagor is not estopped or rebutted to set up the covenants contained in the deed to him.<sup>3</sup>

In Chapter XXV. we pointed out that the title to land may pass in various ways other than by a conveyance, and we gave some illustrations which are appropriate to the matter contained in that chapter. The same principle finds an illustration under the subject of covenants. Thus, if there be a breach of any of the covenants made by the grantor, and the grantee receives full satisfaction, equal to the purchase-money with interest, in an action brought for breach of the covenant,

Arnold, 2 Met. 622; *Cushing v. Hurd*, 4 Pick. 253; *Dow v. Whitney*, 147 Mass. 6. In some states the rule is otherwise: 2 Jones, R. P. § 1400.

<sup>1</sup> *Jamaica Pond Corp. v. Chandler*, 9 Allen, 159; *Chaffin v. Chaffin*, 4 Gray, 280; *Adams v. Cuddy*, 13 Pick. 460; *Fitzgerald v. Libby*, 142 Mass. 235; *Woodward v. Sartwell*, 129 Mass. 210.

<sup>2</sup> *Whitney v. Union Ry. Co.*, 11 Gray, 359; *Sugden on Vendors*, p. 596, § 47, note m; *Parker v. Nightingale*, 6 Allen, 341, 345; *Schwoerer v. Boylston Ass.*, 99 Mass. 297, 298; *Kennedy v. Owen*, 136 Mass. 202, 203. See *Harv. Law Rev.* for January, 1893, pp. 285, 294, 297 *et seq.*

<sup>3</sup> *Sumner v. Barnard*, 12 Met. 459; *Harrington v. Bean*, 36 Atl. Rep. 986 (Me.).

the grantor is by the judgment fully satisfied, remitted to his right in the granted land.<sup>1</sup> In Massachusetts an action in the nature of trover may be maintained for real estate, against a mortgagee, for the wrongful execution of the power of sale, there having been no breach of the conditions of the mortgage; and that, too, whether there has been a *bona fide* purchase for value or not, under the power of sale, and the plaintiff may recover full damages for the loss of the equity of redemption, although even a *bona fide* purchaser for value has not acquired the title as against the mortgagor. And if the mortgagor recover and receive full damages, the title to the land passes to the wrongdoer, or to his grantee, if any. Here, the title is made to pass by virtue of a judgment which has been satisfied.<sup>2</sup>

A covenant of warranty may warrant against an existing mortgage, although that has been previously mentioned in the deed.<sup>3</sup>

<sup>1</sup> 2 Wash. R. P. 675.

<sup>2</sup> Rogers v. Barnes, 169 Mass. 179. See further, 11 Harv. Law Rev. 260.

<sup>3</sup> Ayer v. Phila. Co., 159 Mass. 85 *et seq.*; 7 Harv. Law Rev. 429, 498; Jones v. Adams, 162 Mass. 224, 229; Maupin on Marketable Title, § 121; Baker v. Bradt, 168 Mass. 58, 60; Jones, R. P. § 860; Hamill v. The Inventor's Co., 37 Atl. Rep. 774, 775, 776 (N. J.). But see Hopper v. Smyser, 45 Atl. Rep. 206 (Md.).

## CHAPTER XXIX.

## MORTGAGES.

It is not within the scope of a book of the nature of this, to enter into an elaborate treatise upon the subject of mortgages. The law of mortgages in this country consists of a very great number of conflicting ideas, and there are two great and distinct theories of mortgages which exist in this country and which we shall presently mention. We are of the opinion that an attempt to present the subject of mortgages so as to cover the law of that subject as found in our many states would require a statement not only of many diverse views, but an examination of a good deal of statute law. We hope, therefore, that the following statements of leading principles will be found sufficient, leaving the reader to examine the details of the subject in the books of his own state under whichever grand theory of mortgages may obtain in that state.

"In general terms," a mortgage "may be said to be any conveyance of lands intended by the parties at the time of making it, to be a security for the payment of money or the doing of some prescribed act."<sup>1</sup> The mortgage is therefore upon a condition. It is conditioned in its terms so as to give the mortgagee the estate unless the debt be paid at the maturity thereof, or the prescribed act be done.

"Two opposite theories of the nature of a mortgage hold about equal sway in" the United States.<sup>2</sup> "In England and in most of the courts of the older states of America," a mortgage is regarded as a conveyance in fee. In other states, a

<sup>1</sup> 1 Wash. R. P. 479.

<sup>2</sup> Preface to Jones on Mortgages.



mortgage is regarded "as merely a pledge, and the rights and remedies under it are wholly equitable."<sup>1</sup> In the common-law conception of a pledge, possession of the thing pledged is the essential condition, and the pledgee has a special property in the thing; whereas, by a mortgage, the general title is transferred to the mortgagee, subject to be revested upon performance of the condition, the property of the thing being in him, which he may make absolute, in case the condition is not performed, by foreclosing the right of redemption. The pledgee, on the other hand, can only avail himself of the security by selling the thing if the debt or duty be not discharged; and his interest is only a special property. This is according to the conception of a mortgage in most of the older states of America, as above.<sup>2</sup> It is true a pledgee, at the common law, may assign and thus part with the possession, thus transferring to his assignee his rights as pledgee. But the essence of the pledge is the fact of possession.<sup>3</sup> But still, even in Massachusetts, a mortgage, when considered in relation to the debt, is, "until foreclosure," "a pledge only,"<sup>4</sup> and the interest of a mortgagee of real estate is, at least until entry to foreclose, "but a chose in action." It is "in the nature of a pledge" or "pawn."<sup>5</sup> For these reasons, it is held that it cannot be taken on execution, in an action at

<sup>1</sup> For the views in the different states, see 1 Jones on Mortgages, §§ 17-59.

<sup>2</sup> *Walker v. Staples*, 5 Allen, 34, 35; *Newton v. Fay*, 10 Allen, 507; *Kimball v. Hildreth*, 8 Allen, 168; *Ex parte Fitz*, 2 Lowell, 519; *Luce v. Hadley*, 119 Mass. 229; *Farnsworth v. Boston*, 126 Mass. 3, 4; *Read v. Cambridge*, 126 Mass. 427, 428.

<sup>3</sup> *Jarvis v. Rodgers*, 15 Mass. 408; *Whitaker v. Sumner*, 20 Pick. 399, 405; *Jones v. Baldwin*, 12 Pick. 316; 2 Kent's Com. 579.

<sup>4</sup> *Heburn v. Warner*, 112 Mass. 273, 274. And a mortgagee's interest is, by statute in Massachusetts, assets in the hands of the executor or administrator, if the mortgagee has died before foreclosure and the property, or its equivalent, goes to the representatives as personal estate, and not to the heirs. Mass. R. L. ch. 150, §§ 7, 8, 9.

<sup>5</sup> *Heburn v. Warner*, 112 Mass. 273, 274; *Eaton v. Whiting*, 3 Pick. 488; *Marsh v. Austin*, 1 Allen, 235.

law; nor can it be attached on mesne process.<sup>1</sup> And the widow of a mortgagee has no dower until the mortgage is foreclosed.<sup>2</sup> And in Massachusetts, the widow of a mortgagor is entitled to dower in the equity of redemption (except as against the mortgagee, if the mortgage is a valid incumbrance as against her). This is provided for by statute,<sup>3</sup> but the statute was confirmatory of previous decisions of the Supreme Court.<sup>4</sup> There is curtesy also in an equity of redemption.<sup>5</sup> And, indeed, "as to the rest of the world, except the mortgagee, the entire estate is in the owner of the equity of redemption; but, as between him and the mortgagee, the latter is the owner, not of another, but of the same estate."<sup>6</sup> At common law, and under the Massachusetts system, the mortgagee is entitled to immediate possession of the premises upon execution and delivery of the deed. But customarily, if not invariably, there is a provision contained in the deed preserving the possession of the mortgagor until breach of the mortgage.<sup>7</sup>

The strict quality of the common law gave to the mortgagee an absolute estate upon failure to perform the condition of the mortgage. But here equity intervened, and created a right in the mortgagor to redeem the estate after the expiration of the mortgage, and after what would otherwise be a forfeiture of the estate of the mortgagor. This right or

<sup>1</sup> *Heburn v. Warner*, 112 Mass. 273, 274; *Eaton v. Whiting*, 3 Pick. 488; *Marsh v. Austin*, 1 Allen, 235.

But, under the Massachusetts statute, a bill in equity will lie to reach, and apply in payment of a debt, a mortgagee's interest in real estate. Mass. R. L. ch. 159, § 3, cl. 7.

<sup>2</sup> 1 Wash. R. P. 163.

<sup>3</sup> Mass. R. L. ch. 132, § 4.

<sup>4</sup> *Snow v. Stevens*, 15 Mass. 278; *Gibson v. Crehore*, 3 Pick. 475, 481; *Sheafe v. O'Neil*, 9 Mass. 9, 13.

<sup>5</sup> 1 Wash. R. P. 130, 549.

<sup>6</sup> *Farnsworth v. Boston*, 126 Mass. 3, 4; *Read v. Cambridge*, 126 Mass. 427; *Cowles v. Dickinson*, 140 Mass. 376; *Pfeiffer v. Matthews*, 161 Mass. 489.

<sup>7</sup> 1 Wash. R. P. 475; Tied. R. P. § 322.

estate created in the mortgagor by a court of equity is called the equity of redemption.<sup>1</sup> The doctrine entertained by a court of equity in respect to a mortgage is "that the mortgage is a mere security for the debt, and only a chattel interest." "The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law."<sup>2</sup>

Any person who has an interest in the lands may redeem, — thus, tenants in dower, and by the curtesy, remaindermen and reversioners, judgment creditors, and incumbrancers in general.<sup>3</sup> Even before an assignment of dower, the husband being dead, the widow may redeem.<sup>4</sup> Under the Massachusetts statutes, tenants for years of the mortgagor, and even parties having an easement, may redeem. That statute provides that any person "lawfully claiming or holding" under the mortgagor may redeem.<sup>5</sup> The court think that without that statute at least a tenant for years of the mortgagor may redeem.<sup>6</sup>

Mortgages, however, in modern times, frequently contain a power of sale, providing that the mortgagee may sell the premises upon breach of the provisions of the mortgage, or of any of them. This power operates to enable the mortgagee to convey away the estate of both himself and of the mortgagor. And the power in common use in Massachusetts, for instance, is expressed to give authority to the mortgagee to "convey" "absolutely and in fee simple," and "in his own name, or as the attorney for the grantor." In the execution of the power of sale contained in a mortgage, the terms must be strictly complied with, and the advertisement must be sufficiently full to fully protect the rights of the mortgagor.<sup>7</sup>

<sup>1</sup> 1 Wash. R. P. 478, 553.

<sup>2</sup> 4 Kent's Com. 159, 160.

<sup>3</sup> *White v. Bond*, 16 Mass. 400; 4 Kent's Com. 162.

<sup>4</sup> *Davis v. Wetherell*, 13 Allen, 63.

<sup>5</sup> Mass. R. L. ch. 187, § 18.

<sup>6</sup> *Bacon v. Bowdoin*, 22 Pick. 404-406.

<sup>7</sup> *Roche v. Farnsworth*, 106 Mass. 509.

An absolute deed even of real estate can in equity be shown to be a mortgage by parol evidence.<sup>1</sup> But an absolute conveyance taken in payment of an existing debt is not a mortgage, even in equity, although it be accompanied by an agreement of the grantee to reconvey upon payment by the grantor of a certain sum at a time specified. This amounts to a conditional sale. The essence of a mortgage is, that it be taken as security.<sup>2</sup> An absolute deed with a bond of defeasance back constitutes a mortgage, the two constituting one transaction.<sup>3</sup>

In Massachusetts, even after foreclosure, a mortgagee may sue on the mortgage note; and he will recover as damages whatever balance may be due over and above the value of the premises.<sup>4</sup> And likewise, before foreclosure, he may recover upon the note.<sup>5</sup> The claim on the note is a personal one, and the action a personal action. The proceeding to foreclose is "to enforce the lien upon the debtor's real estate which he has charged with the payment of the debt."<sup>6</sup> This question as to suing after foreclosure has been much in dispute.<sup>7</sup> It has also been disputed whether the suing the debt after foreclosure will open the foreclosure,<sup>8</sup> assuming that the estate has not been sold under a power of sale contained in the mortgage. But even in Massachusetts a mere receipt of part of the money, even after three years from the entry to foreclose, which is the time allowed by statute for redemption, is not, without other evidence of intention to open

<sup>1</sup> *Campbell v. Dearborn*, 109 Mass. 130 ; *Hassam v. Barrett*, 115 Mass. 256; *McDonough v. Squire*, 111 Mass. 217; *Pond v. Eddy*, 113 Mass. 149; *Peirce v. Colcord*, 113 Mass. 372; *Hawes v. Williams*, 43 Atl. Rep. 101 (Me.).

<sup>2</sup> 1 Jones on Mortgages, § 265; 4 Kent's Com. 144 and note *c*.

<sup>3</sup> *Murphy v. Calley*, 1 Allen, 107; 1 Wash. R. P. 480.

<sup>4</sup> *Ely v. Ely*, 6 Gray, 441; *Burtis v. Bradford*, 122 Mass. 131.

<sup>5</sup> *Tompson v. Tappan*, 139 Mass. 507; *Heburn v. Warner*, 112 Mass. 273.

<sup>6</sup> 2 Jones on Mortgages, § 1215.

<sup>7</sup> 4 Kent's Com. 182.

<sup>8</sup> 4 Kent's Com. 182.

the foreclosure, sufficient to do so,<sup>1</sup> and a mere receipt before the expiration of the three years is not sufficient to do so.<sup>2</sup> And if the premises have been sold under a power of sale in a mortgage, an action may be maintained on the note for the balance due.<sup>3</sup> Conversely, a subsequent mortgagee may maintain an action for money had and received against a prior mortgagee, who has sold under his mortgage, for excess over.<sup>4</sup> A foreclosure is a bar to all subsequent incumbrances.<sup>5</sup>

As a general proposition if a mortgagee of real estate, before entry to foreclose, part with the note but not with the mortgage, he becomes a trustee for whoever may become holder of the note in equity. The holder of the note becomes the real mortgagee.<sup>6</sup> And Washburn, referring to the different views of mortgages in the different states, says: "However variant the law may be as to the mode of effectually assigning the interest of a mortgagee, the rights of the assignee and other parties in interest where the assignment has been made, are substantially the same. Some of these are as follows: As a general proposition, if there are several debts secured by the same mortgage, and these have been successively assigned, the assignees will share the benefit of the security *pro rata*," but that it is otherwise in some states.<sup>7</sup> Among the various views as to the character of the title of the assignee of the debt, when, for instance, there has been a mere delivery of the mortgage and the note together, is that of New Hampshire. In that State, such mere

<sup>1</sup> Laurence v. Fletcher, 10 Met. 347; s. c. 8 Met. 165.

<sup>2</sup> Thompson v. Tappan, 139 Mass. 507.

<sup>3</sup> Wing v. Hayford, 124 Mass. 249.

<sup>4</sup> Cook v. Bosley, 123 Mass. 396.

<sup>5</sup> Cronin v. Hazletine, 3 Allen, 325; Palmer v. Fowley, 5 Gray, 545; 1 Wash. R. P. 595.

<sup>6</sup> Young v. Miller, 6 Gray, 154, 156; Crane v. March, 4 Pick. 136; Bryant v. Damon, 6 Gray, 564; Morris v. Bacon, 123 Mass. 58; Welch v. Goodwin, 123 Mass. 71, 78; Aldrich v. Blake, 134 Mass. 585 and *passim*; Stark v. Boynton, 167 Mass. 443; 1 Wash. R. P. 522; 1 Jones on Mortgages, § 804.

<sup>7</sup> 1 Wash. R. P. 524 *et seq.*

delivery creates in the assignee a legal estate in the land, in respect to which a court of common law can give the remedy.<sup>1</sup> If a mortgagee assigns the mortgage, which assignment is recorded, but retains the note as agent of the assignee, and thereafter assigns the mortgage with the note, the first assignee has the better title, because of the recording of his assignment before the second assignment.<sup>2</sup>

If a grantee immediately, and at the same time as the conveyance, mortgages back to the grantor, the wife of the grantee is not entitled to dower as against the mortgagee.<sup>3</sup>

The use of the word "trustee" in the assignment of a mortgage and note imports the existence of a trust and gives notice thereof to all into whose hands the instrument comes.<sup>4</sup>

Under the clause in a deed of real estate, "subject to a mortgage, which the grantee hereby assumes and agrees to pay," the grantor may recover of the grantee the full amount of the mortgage debt and interest upon that debt maturing, and if it has already matured, then forthwith.<sup>5</sup> When a deed of land contains the provision that the grantee shall assume and pay a prior mortgage mentioned therein, this obligation enures for the benefit of the mortgagee in equity, and he may compel the grantee to respond directly to him.<sup>6</sup>

An important principle under the law of mortgages is that which concerns the making of future advances. If a mortgage deed provides for the making of future advances to be protected by the mortgage lien, such provision is valid. It is the better opinion that such provision is valid, if the deed

<sup>1</sup> *Southerin v. Mendum*, 5 N. H. 420; *Smith v. Moore*, 11 N. H. 55; *Rigney v. Lovejoy*, 13 N. H. 247.

<sup>2</sup> *Murphy v. Barnard*, 162 Mass. 72.

<sup>3</sup> *Smith v. McCarthy*, 119 Mass. 519; 4 Kent's Com. 39.

<sup>4</sup> *Sturtevant v. Jaques*, 14 Allen, 523; *R. R. Co. v. Durant*, 95 U. S. 579; *Briggs v. Rice*, 130 Mass. 50; *Thacher v. Churchill*, 118 Mass. 108.

<sup>5</sup> *Furnas v. Durgin*, 119 Mass. 506 *et seq.*; *Carlton v. Jackson*, 121 Mass. 592; 2 Story's Eq. Jur. (11th ed.) § 1016 d.

<sup>6</sup> *Thompson v. Bertram*, 14 Iowa, 476; 11 Harv. Law Rev. 64; 2 Story's Eq. Jur. (11th ed.) § 1016 d.

be recorded, as against all subsequent incumbrances, even though such advances be made after the subsequent lien has attached, and that it is immaterial that the new advances are made after the lender has acquired notice of the subsequent incumbrance. A distinction is made in some cases between an actual notice given to the lender of a subsequent incumbrance, and that constructive notice afforded by the record of the later incumbrance in the registry of deeds. But it would seem that even actual notice by the better opinion would not be effectual, provided that the lender was by the terms of his mortgage deed under obligation to make the advances.<sup>1</sup>

Releases, discharges, and assignments of mortgages, according to equitable doctrines, are taken to constitute that kind of a deed which shall work equity as to the parties interested in the premises. And an assignment shall not be held to operate as a discharge of a mortgage by producing a merger, when it would be inequitable that a merger should be produced.<sup>2</sup>

If land be subject to a mortgage, and be sold off in parcels to different purchasers with warranty deeds, the parcel last sold bears the burden of the mortgage as between it and the other parcels. The parcels are liable in the inverse order of the purchases. The mortgagee can be required to sell the land in the inverse order of the purchases.<sup>3</sup> The above principles have their application when the earlier sale is made without reference to the incumbrance.<sup>4</sup>

<sup>1</sup> 1 Jones on Mortgages, §§ 364-378.

<sup>2</sup> 1 Jones on Mortgages, §§ 850, 856, 857, 858, 864, 868; Crocker's Notes on Common Forms (4th ed.) 183, 184, 193.

<sup>3</sup> 2 Jones, R. P. § 1858; 2 Jones on Mortgages, §§ 1089, 1091, 1092; *Jenkins v. Craig*, 52 N. E. Rep. 423 (Ind.); *Jenkins v. Craig*, 53 N. E. Rep. 427 (Ind.).

<sup>4</sup> 2 Jones on Mortgages, §§ 1620, 1625.

## CHAPTER XXX.

## LICENSES, PROFITS A PRENDRE, AND EASEMENTS.

WE are now to deal with incorporeal rights, and in order to have a clear understanding of one of these, namely, easements, it is best to consider first, licenses and *profits à prendre*. If a man as owner of a piece of land has a right, appurtenant to his land, to use in some way another man's land, there are two tenements, as it is expressed. The land which the man owns is called the dominant tenement, and the other man's land, which is subject to the servitude or burden, is called the servient tenement. A very simple illustration is that kind of an easement which is called a right of way. If a man owning land has, because of his ownership of that land, a right to go across another man's land, here we have the dominant and servient tenements. Now there are incorporeal rights which are called rights in gross. A right in gross is an incorporeal right in another man's land, which is owned without any reference whatever to any land belonging to the owner of the right.

Having stated these elementary principles, we come first to licenses personal to the licensee; they are also personal to the licensor. Such licenses are revocable and are not assignable.<sup>1</sup> Suppose the owner of land authorizes another man to build a house upon the land; this is a mere license personal to the licensee and can be revoked at any time, and is revoked by a sale of the land. Another illustration is this: If a tenant for years is authorized by his landlord to leave his fixtures upon the land so that, after the expiration of the term, he can go at his convenience and take them away, this

<sup>1</sup> 2 Leake, 196-198; *Bond v. O'Gara*, 177 Mass. 139.



license is revoked by a sale or lease of the land to another person.<sup>1</sup> Now, the hardship involved in these strict doctrines has caused a good many of the courts to recognize in equity a right in the licensee which cannot be defeated by a revocation, if he has expended money in making improvements upon the

<sup>1</sup> 2 Leake, 197; *Emerson v. Somerville*, 166 Mass. 115.

An oral agreement that the lessee may remove fixtures does not authorize the lessee to remove the fixtures at the expiration of or during a lease thereafter given, the new lease containing no provision therefor. *Stephens v. Ely*, 56 N. E. Rep. 499 (N. Y.).

Apart from any question of license, and having reference merely to the right to remove fixtures, it was held, in *Watriss v. Cambridge Bank*, 124 Mass. 571, that under a lease containing a right of renewal, if the lessee puts in fixtures, even though they are trade fixtures, yet he cannot remove them after the expiration of the first lease, notwithstanding he continues to occupy under a renewal.

An agreement between a landlord and his lessee that the tenant may remove a fixture is inoperative as against a new lessee who has no notice of the agreement, even in equity. The landlord, before the termination of the lease, refused to allow the removal. The first lessee was enjoined from replevying the thing in a bill in equity brought by the new lessee. *Trask v. Little*, 182 Mass. 8.

The law of fixtures is in such an irreconcilable state that we deem it impossible to formulate it; but the subject may be briefly presented as follows, — to do more might lead to an elaborate treatise which would be beyond the scope of this book: A fixture is a thing of a personal nature which has become attached to real estate in a way to become a part of the real estate. Fixtures may be classified in the following way: first, when the question whether a thing is a fixture or not arises as between vendor and vendee, or as between mortgagor and mortgagee, or as between executor and heir; secondly, when the question arises as between the executor of a tenant for life or of a tenant in tail and the reversioner or remainderman; thirdly, when the question arises as between landlord and tenant. In the first of these classes, the rule that the article is to be taken to be a fixture, that is, taken to be a part of the real estate, is most strictly enforced. It follows that the rule is less strictly enforced in cases under the second class. And in cases under the third class, the rule is very liberal, allowing the removal of the article as personal property in order to encourage trade and industry; a tenant who takes a lease of premises may want to affix a chattel to the building or land for the purposes of his business, and the law is very liberal in allowing him to do this without fear that he has thereby lost his property in the thing affixed. In modern times the intention with which the thing has been affixed has become more decisive than formerly as a test of whether the thing shall be taken to be a fixture or not. 2 Jones, R. P. §§ 1665, 1666, 1668.

land. The cases upon this subject in this country are in great conflict, but the equitable principle is certainly to be commended.<sup>1</sup> In Massachusetts it appears that if a licensee has expended money for improvements, he is entitled to compensation.<sup>2</sup>

Now in *Hodgkins v. Farrington*,<sup>3</sup> a man was licensed to insert his timbers in another man's wall, and this license was executed, but it was held to be revocable. Here we perceive that while the license was executed, yet it did not involve any improvement made upon the land of the licensor. In order to avoid confusion, having reference to another Massachusetts case concerning the sale of standing trees which, in another connection, we shall consider, we point out that that is a case of a sale, while in *Hodgkins v. Farrington* the execution of the license was immaterial; the fact that the man inserted the timbers did not confer upon him any right of an irrevocable kind. Now if the license be accompanied by a valid grant, it is irrevocable. For instance, a man sells goods which are lying upon his land; this raises an implied license to go and get the goods, the sale of the goods constituting a valid grant of them, and the license is irrevocable. Suppose the goods to consist of trees which have been severed from the ground, and the same would undoubtedly apply to a crop which had been severed from the ground, the implied license to go and carry away the material would be irrevocable.<sup>4</sup>

In *Wood v. Leadbitter*,<sup>5</sup> which is the great case cited in-

<sup>1</sup> Hopkins, R. P. 167, 168; 2 Dembitz on Land Titles, pp. 1026, 1027; Jones on Easements, §§ 69-79; *Lambe v. Manning*, 49 N. E. Rep. 512 (Ill.); *Van Horn v. Clark*, 40 Atl. Rep. 204, 205 (N. J.); *Noble v. Sherman*, 52 N. E. Rep. 150 (Ind.); *Jermyn v. Elliott*, 45 Atl. Rep. 939 (Penn.); *Baldwin v. Taylor*, 31 Atl. Rep. 252 (Penn.); *Polk v. Clark*, 48 Atl. Rep. 67 (Md.); *Glass v. Hulbert*, 102 Mass. 33-36.

<sup>2</sup> *Glass v. Hulbert*, 102 Mass. 33-36.

<sup>3</sup> *Hodgkins v. Farrington*, 150 Mass. 19.

<sup>4</sup> 2 Leake, 197, 198; Browne on Statute of Frauds, § 27; *Giles v. Simonds*, 15 Gray, 442.

<sup>5</sup> *Wood v. Leadbitter*, 13 M. & W. 838.

numerable times by text writers and judges, a man bought a ticket to a public show, and was removed from the premises by the managers. It was held that the license to go upon the land was revocable, and that his only remedy would be in damages for breach of the contract, for that the party in possession of the land had a right to remove him, using no more force than was necessary. If more force were used than was necessary, the injured party would likewise have a remedy in tort. It has been said that the right to remove a man from a public show, as, for instance, from the theatre, exists up to the time that he has taken his seat;<sup>1</sup> but this is not sound, for the right exists as much after as before he has taken his seat.<sup>2</sup> If a man hires a dancing hall to be used on certain days in the week, this does not create the relation of landlord and tenant, but is a mere license and can be at any time revoked. The remedy is for breach of contract.<sup>3</sup> And so if a man hires a billboard to post his bills on, the right to use the board is a mere license and can be at any time revoked. The remedy is for breach of contract.<sup>4</sup> The curious question has arisen as to what is the nature of the contract between a railroad company and a passenger who has bought a ticket, and it is held that this does not constitute a mere license, but that it is a contract to carry, and cannot be revoked by the railroad company.<sup>5</sup>

Next as to *profits à prendre*. A *profit à prendre* is a right to take some profit from another man's land, illustrations of which are the right to feed cattle on another's land, the profit consisting of the grass which the cattle eat off of the land;

<sup>1</sup> *Burton v. Scherpf*, 1 Allen, 133; *Browne on Statute of Frauds*, § 24.

<sup>2</sup> *Wood v. Leadbitter*, 13 M. & W. 838; *McCrea v. Marsh*, 12 Gray, 213. See further, 13 Am. & Eng. Ency. of Law, 543, 551.

<sup>3</sup> *Johnson v. Wilkinson*, 139 Mass. 3; *Oxford v. Leathe*, 165 Mass. 254.

<sup>4</sup> *Kerrison v. Smith* (1897), 2 Q. B. 445; *Wilson v. Tavener* (1901), 1 Ch. 578; *Reynolds v. Van Benzen*, 49 N. E. Rep. 763 (N. Y.).

<sup>5</sup> *Butler v. Manchester, etc. Ry. Co.*, 21 Q. B. D. 207 (Court of Appeal).

also such rights as to take gravel or stone or minerals from another's land. *Profits à prendre* can always be in gross, and frequently they are appurtenant. It is ordinarily stated that they are not exclusive, but we shall later see that they may be exclusive.<sup>1</sup> The property in the profit does not pass until it

<sup>1</sup> 2 Leake, 326-330, 341, 342; *Duke of Sutherland v. Heathcote* (1892), 1 Ch. 483-485.

A *profit à prendre* is in general assignable and inheritable, and is irrevocable. 2 Leake, 197, 327.

It is held in New Hampshire, in *Beach v. Morgan*, 41 Atl. Rep. 349 (N. H.), that a right given in gross to fish in a brook is neither assignable nor inheritable.

Commons is a general term for a *profit à prendre*; the word is so used because the right is common as between the owner of the profit and the owner of the soil, or because the right exists in common as between the different owners of the profits. 2 Black. Com. 32; 2 Leake, 332. See further: Williams, R. P. (17th ed.) 388 *et seq.*, 391 *et seq.*, 404. *Municipal Council of Sydney v. Atty.-Gen.* (1894), App. Cas. 451-454.

Commons are chiefly of four sorts: common of pasture, common of piscary, common of turbary, common of estovers. Common of pasture is so called because the right to pasture cattle upon the servient land usually belongs to several people, and it may be in gross, and it may be appurtenant. 2 Black. Com. 32; 2 Leake, 332 *et seq.*, 341, 342; *Municipal Council of Sydney v. Atty.-Gen.* (1894), App. Cas. 451-454. See further, Williams, R. P. (17th ed.) 59, 388, 389, 414, 537, 628-650; *Robertson v. Hartopp*, 43 Ch. Div. 484.

As to common of pasture, see further, Vinogradoff on Villainage in England, 259 *et seq.*; 3 Law Quart. Rev. 374; 1 Pollock & Maitland, 610, 611.

Common of piscary is the right to catch fish. Common of turbary is the right to take turf, nor is the substance usually limited to turf.

Common of estovers is the right to take estovers from the servient land, and it differs from the right which a tenant for life or years has, in that his right is to take estovers from the leased land, whereas common of estovers is the right to take estovers from other land which is a servient estate. 2 Leake, 342; Williams on Commons, 18, 186, 197, 199, 203, 209, 237, 245; 1 Wash. R. P. 22; 2 Wash. R. P. 4. See 1 Kerr, R. P. § 663.

As to estovers, they consist of house-bote, plough-bote and cart-bote, and hay-bote or hedge-bote. Hay-bote or hedge-bote is the right to take wood or timber to repair the hedges or fences on the land. Plough-bote and cart-bote are the right to take wood or timber to repair the implements of husbandry. House-bote includes fire-bote; fire-bote is the right to take wood to burn in the house; and house-bote is the right to take timber for the repair of the buildings on the land. 2 Black. Com. 35.

A release by the owner of the seignory to the freehold tenant, of the

has been taken in possession; and when, as is usually the case, the right is not exclusive, the owner of the land has a right to grant other profits to other parties.<sup>1</sup>

In *Fitzgerald v. Firbank*<sup>2</sup> there was a deed creating a term of years of an exclusive right to fish in a certain part of a certain river. It was held that a bill in equity would lie to restrain people from fouling the stream and for damages. The court says that the lessees have a *profit à prendre*, and that it is an incorporeal hereditament. It would strike many people as strange that a mere term of years can be a hereditament, but upon authority it is correct to speak of it as a hereditament, because it is said that the land in which the term of years exists is itself a hereditament.<sup>3</sup>

In *East Jersey Iron Co. v. Wright*<sup>4</sup> there was a deed to the grantee and his heirs of a right to dig ore. This was held to create a mere revocable license, and that it was revoked by a conveyance of the land by the grantor. This case, it is entirely safe to say, is unsound. What was granted was undoubtedly a *profit à prendre*. It is true that the putting the transaction into the form of a deed does not necessarily make it other than a revocable license. This is shown in *Wood v. Leadbitter* above, which is the leading case on this class of questions.<sup>5</sup> While that is undoubtedly the law, it would be very uncommon for so peculiar a case as that to arise. If the transaction be put into a deed, it ordinarily could not amount to a mere license.

seignorial rights, does not extinguish the tenant's rights of common. *Baring v. Abingdon* (1892), 2 Ch. 374.

<sup>1</sup> 2 Leake, 329, 330; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 322.

<sup>2</sup> *Fitzgerald v. Firbank* (1897), 2 Ch. 96 (Court of Appeal).

<sup>3</sup> See the authorities cited in *Edwards, R. P.* (2d ed.) 16.

<sup>4</sup> *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248, cited in *Wash. on Easements* (4th ed.), 10, nota. See further, *Van Horn v. Clark*, 40 Atl. Rep. 204-206 (N. J. Eq.); *McCotter v. Town of Shoreham*, 41 Atl. Rep. 572, 574 (R. I.); *Eckert v. Peters*, 36 Atl. Rep. 491 (N. J. Eq.); *Miller v. Greenwich*, 42 Atl. Rep. 735 (N. J.).

<sup>5</sup> 2 Leake, 195, citing *Wood v. Leadbitter*, 13 M. & W. 838.

In *Miller v. Greenwich*<sup>1</sup> it was held that a mere licensee has got what we may call a property right, for that he may maintain an action in the courts against any third party who interferes with his rights. This is a very nice point of law, and it would seem that the English Court of Appeals in the above case of *Fitzgerald v. Firbank* does not agree with this, because the court made the effort to show that the right in that case was a *profit à prendre*, an incorporeal hereditament. It is said by a writer<sup>2</sup> in commenting upon the above case of *Miller v. Greenwich* that he approves of it, and he says that a license is not a mere excuse for a trespass, and that the reason why licenses are held to be revocable is because of their not complying with the Statute of Frauds. To this point concerning the Statute of Frauds we demur, for it is the better view that an easement or a *profit à prendre*, if created by writing, must be by deed. The above principle that if in writing it must be by deed is older than the Statute of Frauds; it is a principle of common law;<sup>3</sup> and going a little further as to the Statute of Frauds, it is held in Massachusetts, in *Fletcher v. Livingston*,<sup>4</sup> that in the case of a sale of growing timber, standing trees, even though the Statute of Frauds be complied with, the license to enter and cut and carry away is revocable as to all trees not cut. Of course it is irrevocable as to all which

<sup>1</sup> *Miller v. Greenwich*, 42 Atl. Rep. 735 (N. J.).

<sup>2</sup> 13 Harv. Law Rev. 151.

<sup>3</sup> (*Cobb v. Fisher*, 121 Mass. 169; *Craig v. Lewis*, 110 Mass. 379, 380), cited in 4 Shars. & Budd, 523; *North British Co. v. Park Yard Co.* (1898), App. Cas. 646, 647; *Wessels v. Colebank*, 51 N. E. Rep. 640 (Ill.); *In re Fuller's Estate*, 42 Atl. Rep. 981 (Vt.); *Novlin Co. v. Wilson*, in 13 Harv. Law Rev. 62; Digby, R. P. (5th ed.) 183; 2 Leake, 346.

A sale not by deed of standing trees or of a standing crop is not properly a *profit à prendre*. But Leake shows that a sale of standing trees, accompanied with a license to enter, cut and take them away, the title to pass upon their being taken by the vendee, is "in the nature of" a *profit à prendre*, and may be classed with such rights. The cases cited by Leake are cases in which the transaction was by deed. 2 Leake, 30.

<sup>4</sup> *Fletcher v. Livingston*, 153 Mass. 388, cited in Benjamin on Sales (Bennett's 7th ed.) 134.

have been severed from the ground. Here we perceive that a partial execution of a license makes it irrevocable to the extent that it has been executed. As to the Statute of Frauds, it may be well to point out that the only difference between the section relating to the sale of an interest in lands and the section relating to the sale of goods, is that the land section can only be satisfied by a memorandum in writing, while the goods section can be satisfied in that way and in other ways.

Prescription is one of the ways in which an incorporeal right in land can be acquired. It was provided by the Statute of Westminster I., ch. 39 (3 Edw. I.), which was a statute of limitations, that a writ of right could not be brought to recover land relying upon an older seisin than the beginning of the reign of Richard I. In other words, the demandant must show that he or those under whom he claimed had been seised of the land more recently than the beginning of the reign of Richard I. What is called the equity of this statute was applied to the incorporeal hereditament, and it became the law that if a person claimed a right to use another man's land, the right being of an incorporeal sort, and if he or those under whom he claimed had used the land, he must show that the user had begun as far back as the beginning of the reign of Richard I. This was called immemorial user or usage, and such user created a right by what is called prescription. The beginning of the reign of Richard I. was called "time whereof the memory of man runneth not to the contrary." Thus to recover the corporeal hereditament one must show a seisin since the beginning of the reign of Richard I., and to recover an incorporeal hereditament one must show a user ever since that time. Now when this Statute of Westminster I. was passed, the period back to the beginning of the above reign was about eighty-six years; and things went on in this way until the period had become extended to over three hundred years, so that in the reign of Henry VIII. another statute of limi-

tations was passed, fixing the period at sixty years.<sup>1</sup> After that a user for sixty years might be sufficient to give a prescriptive right, and even a user for an ordinary lifetime might be enough, yet it seems that if in such cases it could be shown that in point of fact the user had not begun so far back as the beginning of the reign of Richard I., a prescriptive right would not be gained. At last in the reign of James I. a statute of limitations was passed fixing the period at twenty years, and from that time the judges of England began to instruct juries that if they should find a user for twenty years, they might consider this as evidence of a lost grant, which would be the recognition that a prescriptive right had been gained.<sup>2</sup> This theory of basing prescription upon a fictitious lost grant has been many times condemned by writers as a clumsy fiction, and it is urgently claimed by many that the true basis of prescription is by analogy to the statute of limitations. Now here are two distinct questions: First, it is universally conceded that the prescriptive period is measured by the period fixed by the statute of limitations, which in most of the states of this country and in England is twenty years.<sup>3</sup> The other question is, whether we shall ground prescription upon the fiction of a lost grant or upon analogy to the statute of limitations. The prevailing view in this country<sup>4</sup> and the perfectly settled view in England is that the

<sup>1</sup> Tudor's Lead. Cas. (3d ed.) 180; 2 Black. Com. 266, note 6 (Sharswood's ed.); 2 Black. Com. 425 (Hammond's ed.); Gray, J., in *Edson v. Munsell*, 10 Allen, 561 *et seq.*; 2 Inst. 238; 17 Vin. Abr. 272; 2 Rolle's Abr. 269.

For a statement as to the law of limitation preceding the time of Edward I., see Prof. Maitland in 5 Law Quart. Rev. 256.

<sup>2</sup> Tudor's Lead. Cas. (3d ed.) 180, 181; 2 Black. Com. 426 (Hammond's ed.); 2 Black. Com. 266, note 6 (Sharswood's ed.); 4 Shars. & Budd, 238; 2 Black. Com. 265, note (Wendell's ed.).

<sup>3</sup> 2 Wash. R. P. 48, 49; 4 Shars. & Budd, 138, 144, 200; *Mann v. Brodie*, 10 App. Cas. 385, 386.

<sup>4</sup> *Goddard on Easements* (Bennett's ed.) 136; *Stearns v. Janes*, 12 Allen, 584; *Carrig v. Dee*, 14 Gray, 585; *Powell v. Bagg*, 8 Gray, 443; *Claffin v. Boston & Albany R. R.*, 157 Mass. 498; *Spottiswoode v. R. R. Co.*, 40 Atl. Rep. 508, 509 (N. J.).



basis is that of a lost grant. The late English cases declare that they will not presume a lost grant if it affirmatively appear that there was no grant,<sup>1</sup> and in *Neaverson v. Peterborough*<sup>2</sup> the court declines to find a lost grant when to do so would involve an illegal act; but in the United States it is the law that if the other elements of prescription are present, the presumption of a lost grant is *juris et de jure*, that is to say, it is conclusive.<sup>3</sup> The doctrine that a lost grant is the basis of prescription has been severely condemned by various writers. But as we have seen, it still continues to be the law in England, and it is the prevailing doctrine in the United States, including Massachusetts. But when it cannot be applied, prescription may be based upon analogy to the statute of limitations, and we have a Massachusetts case, *Atty.-Gen. v. Revere Co.*,<sup>4</sup> in which this was held. In order to explain this case, we must state the following facts: A great pond in Massachusetts is a pond covering more than ten acres; by the Colony ordinance of 1647 it was provided that great ponds should be public except in so far as they had at that time been appropriated by private owners. Now in *Atty.-Gen. v. Revere Co.* the action was brought in equity to restrain the defendant from lowering the waters of a great pond. It appeared that the defendant had used the waters of the pond for more than twenty years, but a lost grant could not be presumed because "*nullum tempus occurrit regi*," — no length of time can bar the king. But there was a statute of limitations having a period of twenty years binding the Commonwealth equally

<sup>1</sup> *Simpson v. Mayor, etc.* (1896), 1 Ch. 215; affirmed on appeal, (1897), App. Cas. 696; *Chastey v. Ackland* (1895), 2 Ch. 402, 403; *Wheaton v. Maple Co.* (1893), 3 Ch. 67; *Phillips v. Halliday* (1891), App. Cas. 231, 235-238; *Tilbury v. Silva*, 45 Ch. Div. 122, 123, 125; *Bass v. Gregory*, 25 Q. B. D. 481; *Lewis v. N. Y., etc. R. R.*, 56 N. E. Rep. 546 (N. Y.); *Neaverson v. Peterborough* (1901), 1 Ch. 22; *Bailey v. Clark* (1902), 1 Ch. 649; *Union Co. v. London Co.* (1902), 2 Ch. 557.

<sup>2</sup> *Neaverson v. Peterborough* (1902), 1 Ch. 557.

<sup>3</sup> See the authorities in note 4, page 418, above.

<sup>4</sup> *Atty.-Gen. v. Revere Co.*, 152 Mass. 444.

with individuals, and the court held that by analogy to that statute of limitations a prescriptive right had grown up in the defendant which was good against the Commonwealth.

Ordinarily easements are restrictive of the use of land by the owner thereof. For instance, if one has a right of way in another's land, the use of that other's land is to some extent restricted; but there are a few cases in which there may be an easement involving the doing of some positive act. Thus, in *Whittenton Mfg. Co. v. Staples*<sup>1</sup> there were various mills upon a stream, and there was a reservoir dam in use for the benefit of all the mills, and a custom had grown up among the mill-owners to put out their money for the repair of the reservoir dam, and this custom had persisted for more than twenty years. A man bought one of these mill sites but did not know of the custom, neither did the deed to him contain any mention of it. Moreover, when he bought, the dam upon his property was broken down. This was a suit in equity to compel him as owner of his parcel of land, his mill site, to contribute to the expenses of the repairing of the reservoir dam. And it was held that there had been gained a right by prescription constituting an easement in his land to oblige him, as owner of the land, to pay the money. Easements of this kind have been called spurious easements, and common illustrations of this class are obligations to keep in repair fences and ways.<sup>2</sup>

We will now define an easement. An easement is a right without profit, which an owner of land has in another man's land appurtenant to his own land. It is thus perceived that a true easement involves a dominant and a servient tenement.<sup>3</sup> But the word "easement" is used constantly to express an incorporeal right in land when there is no dominant tenement

<sup>1</sup> *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319.

<sup>2</sup> 9 Harv. Law Rev. 353; *Whittenton Mfg. Co. v. Staples*, 164 Mass. 331, 334.

<sup>3</sup> 2 Leake, 189, 190, 326; 4 Shars. & Budd, 123; *Simpson v. Mayor*, etc. (1896), 1 Ch. 219; s. c. (1897) App. Cas. 696.

and when the right is not a *profit à prendre*. We are justified in using the word "easement" in this broad way, because there is no other word which we can substitute for it. Now most deeds contain a provision that the grantor conveys the land with the appurtenances, and this word "appurtenances" is not required to pass an easement when the dominant estate is conveyed, for easements will pass with the dominant estate though no mention be made of them.<sup>1</sup>

There is a great distinction between easements and covenants of title. An easement binds the land so that a disseisor has a right in the servient tenement by virtue of his having got the seisin of the dominant tenement. But suppose that the disseisee has a right under a covenant of general warranty, this right does not enure to the disseisor, and, as it is expressed, easements bind the land, covenants of title affect the estate.<sup>2</sup>

We have thus far considered the principles of the doctrine of prescription, and now will turn to a consideration of the elements which constitute such a user as will create a prescriptive right. The usual enumeration of these elements is as follows, but we shall be obliged to explain some of the terms and shall see that they are not to be taken literally. A user must be adverse, under a claim of right, continuous, exclusive, uninterrupted, with the knowledge and acquiescence of the owner of the servient estate, and while he was under no disability affecting his means of asserting his rights.<sup>3</sup> As

<sup>1</sup> 2 Leake, 189; Goddard on Easements (Bennett's ed.), 283; Wash. on Easements (4th ed.) 25; *Jarvis v. Seele Co.*, 50 N. E. Rep. 1044 (Ill.); *Barry v. Edlaritch*, 35 Atl. Rep. 170, 173 (Md.); *Macin v. Haven*, 58 N. E. Rep. 453 (Ill.).

<sup>2</sup> *Norcross v. James*, 140 Mass. 189, 190; *Walsh v. Packard*, 165 Mass. 190; 4 Kent's Com. (14th ed.) 480, notes; *Morton v. Thompson*, 38 Atl. Rep. 89 (Vt.); *Levin v. N. Y. Co.*, 59 N. E. Rep. 261 (N. Y.).

<sup>3</sup> Wash. on Easements, 150 (ed. of 1885); *Sprow v. Boston & Albany R. R.*, 163 Mass. 341; *M'Inroy v. Duke of Athole* (1891), App. Cas. 629, 632-634, 638; *Tilbury v. Silva*, 45 Ch. Div. 98; *Watters v. Snouffer*, 41 Atl. Rep. 785 (Md.); *Davis v. Cleveland Ry. Co.*, 39 N. E. Rep. 495, 496 (Ind.); *O'Brien v. Goodrich*, 177 Mass. 33; *Gulick v. Fisher*, 48 Atl. Rep. 375 (Md.).

to this matter of disability we will later examine more fully the proposition laid down in the books. In Maine and Maryland the word "exclusive," above, has been taken literally, so that if any other person than the owner of the estate claimed to be dominant, exercises a user, the user of the owner of the estate claimed to be dominant is not exclusive, and he cannot acquire a prescriptive right.<sup>1</sup> But the better view is, and it is so held in Massachusetts, that the word "exclusive" means that the claimant must rely exclusively upon his own user or that of those under whom he claims, and not upon the user of third parties, in order to create, as appurtenant to his land, an easement by prescription.<sup>2</sup> As to knowledge and acquiescence above, it is not necessary that the owner of the servient estate should have actual knowledge that his land is being used, but the user must be sufficiently conspicuous to bind him with implied knowledge, which is to say that an owner of land ought to have known it whether he did or not. As to the expression "adverse and under a claim of right," the great distinction is that the user must not begin by permission, so that if the user begins under a license or lease, no length of time will cause it to ripen into a prescriptive right.<sup>3</sup> But of course it may begin by license or lease, and then later the party may begin an adverse user under a claim of right, and in such a case the prescriptive right would date from the time that the user began to be adverse and under a claim of right. The distinction between what is a permission and what is under a claim of right is very shadowy, and is often very difficult to apply. Sometimes the transaction, if there be one when the user begins, is im-

<sup>1</sup> Wash. on Easements, 97; *Gulick v. Fisher*, 48 Atl. Rep. 376, 377 (Md.).

<sup>2</sup> Wash. on Easements, 97 *et seq.*

<sup>3</sup> *Stearns v. Janes*, 12 Allen, 584; *Chenary v. Fitchburg R. R.*, 160 Mass. 212; *Brown v. King*, 5 Met. 181; *Chamber Colliery Co. v. Hopwood*, 32 Ch. Div. 549; *Penn. R. R. v. Hulse*, 35 Atl. Rep. 790 (N. J.); *Gay v. Tower*, 173 Mass. 385, 386; *Carger v. Fee*, 39 N. E. Rep. 95 (Ind.); *Moffatt v. Kenny*, 174 Mass. 314.

portant as showing the nature of the right claimed, that is to say, whether the user began by permission or whether it began adversely. Thus, in *Stearns v. Janes*,<sup>1</sup> a man claimed a right to go upon his neighbor's land and draw water from the well for the benefit of the house on his own land. A conversation between the owners of the two lots of land, which took place more than twenty years before, at the time the user began, was held admissible in evidence as tending to show what was the nature of the subsequent user, and this transaction and the acts of user were submitted to the jury under instructions from the court defining the law. Such questions are usually left to the jury.<sup>2</sup> A parol gift of the right to use another's land is a good foundation for a user which in twenty years will ripen into a prescriptive right.<sup>3</sup> It is often exceedingly difficult to decide, provided that the user began with some transaction between the parties, whether that transaction was a mere permission or whether it was a parol gift. In one case it appeared that at the time a man conveyed a part of his land the grantee told the grantor that he could use a way over the granted land; more than twenty years afterward it was claimed by a successor in title to the grantor that a prescriptive right appurtenant had been gained by the user of the way. The court admitted the evidence as tending to show that a prescriptive right appurtenant to the grantor's land had been gained in the granted land.<sup>4</sup> If a person dedicate a piece of his land to public use by making it a part of the highway, which dedication is void because not accepted by the town under the statutes, and the public use the land for more than twenty years, this is a user beginning adversely, because the party has undertaken to make what is in effect a grant of it. Moreover, the town will be liable for injury arising from a

<sup>1</sup> *Stearns v. Janes*, 12 Allen, 584.

<sup>2</sup> *Stearns v. Janes*, 12 Allen, 583; *Slater v. Gunn*, 170 Mass. 509.

<sup>3</sup> *Stearns v. Janes*, 12 Allen, 584; *Sumner v. Stevens*, 6 Met. 338.

<sup>4</sup> *Ashley v. Ashley*, 4 Gray, 199.

defect in the strip, although it has not accepted the land by any formal act.<sup>1</sup> In *Mattes v. Frankel*,<sup>2</sup> at the time a man sold a part of his land he told the grantee that he could have the right to use an existing way to and from the granted land over the grantor's retained land. This case did not contain the element of a user; it therefore is not such a case as we have been considering, in which the right ripens into a prescriptive title by twenty years' user; but the court held that the grantor was estopped to deny to the grantee the right to use the way.

In *Lemmon v. Webb*<sup>3</sup> the branches of a man's tree grew across the boundary line, and the neighbor cut them off without giving any notice to the other party. At the time this was done the branches had extended across the boundary line for more than twenty years. It was held that it was an act of negligence for the owner of the tree to allow it to encroach upon the neighbor's land, and that the thing was a nuisance legally speaking, and that no right had been gained in the neighbor's land either by prescription or under the statute of limitations, for that no such right could be acquired, because the encroachment was by imperceptible and slow degrees; and that in the case of roots, says the court by way of dictum, for the case related wholly to branches, the encroachment is also secret. The court held that no notice was required, although to cut the branches off without notice was an unneighborly act.

We now come to the elements in the above list of items

<sup>1</sup> *Bassett v. Harwich*, 180 Mass. 585. A dedication to a public use does not depend for its validity upon the length of time that the user, if any, has been enjoyed.

<sup>2</sup> *Mattes v. Frankel*, 52 N. E. Rep. 585 (N. Y.).

<sup>3</sup> *Lemmon v. Webb* (1894), 3 Ch. 1, affirmed on appeal, (1895), App. Cas. 1. See further, 3 Kent's Com. 438, note; Tied. R. P. § 9; 1 Gray's Cases on Prop. 543-555; 21 L. R. A. 729, note; 37 Central Law Journal, on page 458; Williams, R. P. (17th ed., Am. notes) 34; Wash. on Easements (4th ed.) 758; 2 Univ. Law Rev. 93. And see *Robinson v. Clapp*, 32 Atl. Rep. 939 (Conn.); *Robinson v. Clapp*, 35 Atl. Rep. 504 (Conn.).

concerning prescription, which are that the user must be uninterrupted and with the acquiescence of the owner of the servient estate. In *Powell v. Bagg*<sup>1</sup> a man was repairing an aqueduct upon his neighbor's land, which he claimed the right to use for the benefit of his own land near by, and the owner of the land went upon it and forbade the repairing of the aqueduct. After twenty years from the time that the aqueduct began to be used, the claim was set up that an easement by prescription had been gained; but the court held that the forbidding the use of the aqueduct tended to show a lack of acquiescence, and therefore that it amounted to an interruption, so that no prescriptive right was gained. This is a curious point, for if the talk had occurred in the street it would have had no importance; but the fact that it occurred upon the land was the essential element. In *McFarlan v. Lehigh Valley R. R.*<sup>2</sup> the New Jersey court disputes the ground of *Powell v. Bagg*, and claims that the fact that the owner of the dominant tenement kept on with his user is all the stronger evidence to show the existence of his prescriptive right, and that to constitute an interruption there must be a legal interference. In *Brayden v. N. Y., N. H. & H. R. R.*<sup>3</sup> it appeared that the public were in the habit of using a path across a man's land. The owner of the land put up a fence to obstruct the way, and this was almost immediately torn down and the way continued to be used as before. It was held that the putting up of the fence constituted an interruption. It is laid down, and is undoubtedly sound doctrine, that an obstruction put across a way must be a genuine obstruction in order to amount to an interruption, that is to say, it must actually obstruct.<sup>4</sup>

<sup>1</sup> *Powell v. Bagg*, 8 Gray, 441. See further, *Sprow v. Boston & Albany R. R.*, 163 Mass. 341.

<sup>2</sup> *McFarlan v. Lehigh Valley R. R.*, 43 N. J. (Law) 605; cited in 4 Shars. & Budd, 145-147, 210.

<sup>3</sup> *Brayden v. N. Y., N. H. & H. R. R.*, 172 Mass. 225.

<sup>4</sup> *Weid v. Brooks*, 152 Mass. 302, 303, 306.

In *Boston & Maine R. R. v. Sullivan*<sup>1</sup> the court enjoined a hackman by a bill in equity from soliciting passengers at the plaintiff's railroad station. This is a very interesting case, as giving an interpretation to the Massachusetts statute which many years ago enlarged the equity jurisdiction of the Massachusetts court, for the court holds that it was not necessary in order to lay a foundation for a proceeding in equity, that the plaintiff should bring successive actions of trespass *quare clausum*; and as the title to land was not in dispute, there was no objection to the maintenance of the bill in equity. Now this was not a case of a claim of prescription, but had it been such, there is no doubt that the injunction would have operated as an interruption of the user; and since this case was decided this has been held in *Cobb v. Mass. Chem. Co.*<sup>2</sup>

The user essential to create a prescriptive right may be by different persons in succession, and if there be a privity between them, their successive users may be tacked; thus the user by a grantor may be continued by his grantee, a user by an ancestor may be continued by his heir, and a user by a testator may be continued by a tenant for life and after him by the remainderman, although curiously there is no privity, strictly, between a tenant for life and a remainderman, because a remainderman does not claim under a tenant for life of the particular estate.<sup>3</sup>

Taking up the last of the items in the list of essentials required to constitute a prescription, we have the proposition that the owner of the servient estate must not be under disability, and here we must distinguish between a disability which exists at the time the user begins and a disability which arises after the user begins. Now on this very point the law is not settled. In Massachusetts we have the case of

<sup>1</sup> *Boston & Maine R. R. v. Sullivan*, 177 Mass. 230.

<sup>2</sup> *Cobb v. Mass. Chem. Co.*, 179 Mass. 423.

<sup>3</sup> *Leonard v. Leonard*, 7 Allen, 277, 281; 2 Jones R. P. § 1642, 1662; Jones on Easements, §§ 24, 197; *Haynes v. Boardman*, 119 Mass. 414.



Ballard *v.* Demmon,<sup>1</sup> in which a prescriptive right of way was claimed, and at the time the user began the owner of the servient estate was under no disability. Afterward he fell under disability. The disability appears to have consisted in the possession of his land coming into the hands of lessees or tenants, although this point is not very clear. It was held that the subsequently occurring disability did not prevent the acquisition of a prescriptive right by a user, and the court seems to rely somewhat on the fact that there is a statute in Massachusetts which provides for an interruption of a growing prescriptive right of way by posting a notice on the premises and also by serving notice upon the party using the land. But it yet remains to build up a settled American doctrine concerning this question. Some authorities suggest a suspension during the disability, and that the two periods, antecedent and subsequent, should be added together.<sup>2</sup>

Continuing now as to the matter of disability, of course upon the part of the owner of the tenement claimed to be servient, we will consider it as existing at the time that the user begins, and we have just above considered it as itself beginning after the user has begun. Now the books say that no user which runs against a married woman or an insane person or a minor can ripen into a prescriptive right, for the person was under one of these disabilities when the user began.<sup>3</sup> But there can be no doubt, notwithstanding such language, that if, after the disability has been removed, the user should continue, then a prescriptive right might arise, the twenty years dating from the removal of the disability. And so a user begun against a tenant for life or a tenant for years cannot prejudice the reversioner or remainderman, for the reversioner or remainderman is under the disability of not being in the

<sup>1</sup> Ballard *v.* Demmon, 156 Mass. 449.

<sup>2</sup> Goddard on Easements (Bennett's ed.), 165; Wash. on Easements (edition of 1885), 187 *et seq.*; Prof. Gray in 7 Harv. Law Rev. 407.

<sup>3</sup> Wash. on Easements (edition of 1885), 184 *et seq.*

possession of his land;<sup>1</sup> and it is said in a late case that no prescriptive right can be created against the tenant for life or years himself.<sup>2</sup> As to married women, above, the married women's acts operating in the different states of this country and in England have emancipated married women with respect to their property rights, so that we see no reason to-day why a married woman should be regarded as under disability.

*Profits à prendre* cannot be acquired by custom. Thus, the inhabitants of a township cannot claim a right to take sand, gravel, etc., or to catch fish by custom. Three reasons are given by different writers: first, that if it could be acquired by custom the inhabitants of the town would use up all the material, that is to say, they would consume all the gravel or sand, etc., or they would catch all the fish; secondly, the right would not be releasable, and it would be an anomaly for a property right not to be releasable; it would not be releasable, because a release given by one set of inhabitants of the town would not be binding upon a set of persons who should thereafter become the inhabitants;<sup>3</sup> thirdly, the right would depend upon the supposition of a lost grant, and no grant could be presumed to have been given to a set of inhabitants of a town.<sup>4</sup>

<sup>1</sup> Wash. on Easements (edition of 1885), 185; Tudor's Lead. Cas. (3d ed.) 181; *Wheaton v. Maple Co.* (1893), 3 Ch. 63, 65, 69.

<sup>2</sup> *Wheaton v. Maple Co.* (1893), 3 Ch. 63. See further, Wash. on Easements (edition of 1885), 110, 111 and note.

<sup>3</sup> 2 Leake, 560-563; Jones on Easements, § 54; *Albright v. Cortright*, 45 Atl. Rep. 634 (N. J.).

<sup>4</sup> Digby, R. P. (5th ed.) 184, note.

## CHAPTER XXXI.

### THE CORPOREAL HEREDITAMENT AND THE STATUTE OF LIMITATIONS.

IN the previous chapter we have dealt with the subject of incorporeal rights, and have explained prescription, which is one of the methods by which incorporeal rights may be acquired; and there is such a resemblance between the acquirement of these rights by prescription and the acquirement of the corporeal hereditament by adverse possession under the statute of limitations, that we think it expedient to introduce that subject here.

The incorporeal hereditament can, of course, be acquired by prescription, but Blackstone says<sup>1</sup> that a corporeal hereditament cannot be acquired by prescription and for the reason stated by him that an incorporeal hereditament, as a common or a right of way, may be used only at intervals of time, while the possession of a corporeal hereditament is in its nature permanent. Professor Hammond, however, says<sup>2</sup> that it was not the law in the days of Littleton, and later in the days of Coke, that a corporeal hereditament could not be acquired by prescription; but he adds, this is of no practical importance to-day, because in the case of the corporeal hereditament, as well as in the other case, a positive title is gained; that is to say, the statutes of limitations which give the right to the corporeal hereditament establish a positive title, and do not operate merely to extinguish a remedy.<sup>3</sup> In *Currier v. Stud-*

<sup>1</sup> 2 Black. Com. 264.

<sup>2</sup> 2 Black. Com. 416-418, 421, 422 (Hammond's ed.). See further, 2 Pollock & Maitland, 81, 139, 140.

<sup>3</sup> 2 Black. Com. 416-418, 421, 422 (Hammond's ed.); *Currier v*

ley,<sup>1</sup> Knowlton, J., says, "It is held everywhere that adverse possession of real estate for the period prescribed in the statute of limitations not only bars a suit to recover it, but gives a good title against the former owner; and there are decisions and dicta in many courts applying the same rule to adverse possession of personal property."

It is undisputed law, if a man trespasses upon land wilfully and occupies it for the period of the statute of limitations, claiming adversely, that he thereby acquires the title to the land,—that is to say, he acquires the corporeal hereditament; but the authorities are not agreed as to whether he acquires the title, provided that he has encroached upon the land by mistake,—in other words, the law is perfectly clear in his favor in the case of pure stealing, but not when his intentions are innocent. But the weight of authority is that in both of these cases he acquires the title under the statute of limitations.<sup>2</sup>

Studley, 159 Mass. 22; 2 Dembitz on Land Titles, 1346, notes; Moore v. Hinkle, 50 N. E. Rep. 822, 824 (Ind.); Spottiswoode v. R. R. Co., 40 Atl. Rep. 508, 509 (N. J.).

A mortgagor or his grantee does not hold adversely to the mortgagee, until he has distinctly disclaimed holding under him and has asserted title in himself. Holmes v. Turner's Falls Co., 150 Mass. 548, 549; Anthony v. Anthony, 161 Mass. 351; Short v. Caldwell, 155 Mass. 57; Bacon v. McIntire, 8 Met. 87; Tarbell *et al.*, Petitioner, 160 Mass. 407.

Possession by a mortgagor for the period of the statute of limitations (twenty years) is not conclusive, yet it is presumptive. There may have meantime been a recognition of the mortgage debt, as by payment of the interest or part payment of the principal, or other admissions of the vitality of the debt. Cheever v. Perley, 11 Allen, 586; Kellogg v. Dickinson, 147 Mass. 437. See Staples v. Staples, 38 Atl. Rep. 498 (R. I.); Jones v. Foster, 51 N. E. Rep. 862 (Ill.); Magee v. Bradley, 35 Atl. Rep. 103 (N. J. Ch.); Depew v. Colton, 46 Atl. Rep. 728 (N. J.). See further as to some of the states, 2 Dembitz on Land Titles, § 189. For a peculiar rule in New Jersey, see Ely v. Wilson, 47 Atl. Rep. 806 (N. J. Ch.).

<sup>1</sup> Currier v. Studley, 159 Mass. 22.

<sup>2</sup> Warren v. Bowdran, 156 Mass. 282; 7 Harv. Law Rev. 241, 242, 377; 9 Harv. Law Rev. 289, 464; 13 Harv. Law Rev. 152, 225; 21 L. R. A. 829, note; Hopkins, R. P. 465, note; Rae v. Miller, 68 N. W. Rep. 899 (Ia.); Labrador Co. v. The Queen (1893), App. Cas. 104; Jordan v. Riley, 178 Mass. 524; 2 Dembitz on Land Titles, § 182.

What is adverse and exclusive possession of land, and what is an interruption of such possession, depend very much upon the character and situation of the land ; thus, whether remote from dwellings, as woodland or pasture land, or whether, on the other hand, in a settled locality.<sup>1</sup> In *Bowen v. Guild*<sup>2</sup> a man entered upon uncultivated land without the knowledge of the person claiming to be in adverse possession thereof. It was held that the court could not say, as a matter of law, that this entry was an interruption of the adverse possession within the statute of limitations, and that it was a question for the jury, and that it is usually a question for the jury whether an entry is an interruption, also whether possession has been adverse.<sup>3</sup> In dealing with prescription, we said that such ques-

<sup>1</sup> *Bowen v. Guild*, 130 Mass. 121.

<sup>2</sup> *Bowen v. Guild*, 130 Mass. 121; *Houghton v. Wilhelmy*, 157 Mass. 521; cited in *Pattee's Ill. Cas.*, Part 3, p. 585; *Harrison v. Dolan*, 172 Mass. 396; *Watkins on Descents* (4th ed.) 47, note 1.

<sup>3</sup> That the question of adverse possession is usually for the jury, see *Kerr*, R. P. § 615, note, § 2273; 1 *Dembitz on Land Titles*, p. 447; 2 *Dembitz on Land Titles*, §§ 181, 182; *Bracken v. Union Pac. Ry.* 75 Fed. Rep. 347; *Smith v. Lincoln*, 170 Mass. 488, 489; *Moore v. Hinkle*, 50 N. E. Rep. 822 (Ind.); *Spottiswoode v. R. R. Co.*, 40 Atl. Rep. 507, 509 (N. J.); *Sullivan v. Eddy*, 45 N. E. Rep. 837 (Ill.); *Hart v. Williams*, 41 Atl. Rep. 983 (Penn.); *Merwin v. Morris*, 42 Atl. Rep. 855 (Conn.); *Harrison v. Dolan*, 172 Mass. 395, 396; *Milnes v. Van Gilder*, 47 Atl. Rep. 197 (Penn.); *Heller v. Cohen*, 48 N. E. Rep. 527 (N. Y.); *Bentley v. Root*, 32 Atl. Rep. 919 (R. I.).

It is held, in *Heller v. Cohen*, 48 N. E. Rep. 527 (N. Y.), that the court cannot say, as matter of law, that undisturbed possession for more than the statutory period (20 years) will give title by adverse possession. See *Bentley v. Root*, 32 Atl. Rep. 919 (R. I.).

In the following cases, held on the facts, as matter of law, that there had been no adverse possession: *McCloskey v. Hayden*, 48 N. E. Rep. 432 (Ill.); *Lyell v. Kennedy*, 14 App. Cas. 437, 457; *Davis v. Howard*, 50 N. E. Rep. 258 (Ill.); *Linen v. Maxwell*, 40 Atl. Rep. 184 (N. H.); *Day v. Philbrook*, 36 Atl. Rep. 991 (Me.); *Pittsburgh, etc. R. R. Co. v. Beck*, 53 N. E. Rep. 439, 442 (Ind.); *Sullivan v. Tichenor*, 53 N. E. Rep. 561 (Ill.); *Nickrans v. Wilk*, 43 N. E. Rep. 741 (Ill.); *Lewis v. N. Y. & Harlem Ry. Co.*, 56 N. E. Rep. 540 (N. Y.); *Chicago & Alton Ry. Co. v. Keegan*, 56 N. E. Rep. 1088 (Ill.).

In the following cases, held on the facts, as matter of law, that there had been adverse possession: *Hasson v. Klee*, 37 Atl. Rep. 184 (Penn.);

tions very commonly are left to the jury, of course in all these cases, under proper definition of the law by the court in its charge to the jury. In *Harrison v. Dolan*<sup>1</sup> land was sold for taxes, and the deed was made to the disseisee. It was held that this did not constitute an interruption within the statute of limitations, at least, said the court, before the Massachusetts statute of 1891, under which statute a right of entry is made assignable. In *Batchelder v. Robbins*<sup>2</sup> the court says that for an entry to operate as an interruption of adverse possession, the entry must be open and not clandestine. In *Maxwell Land Co. v. Dawson*<sup>3</sup> it is held by the Supreme Court of the United States that evidence is admissible that it was the reputation in the neighborhood that the party in possession claiming adversely was understood to be the owner; this is bearing upon the question whether his possession was adverse or not. In *Bond v. O'Gara*<sup>4</sup> a party was in possession of land under a license from the owner thereof. The owner conveyed the land, and the licensee still continued in possession and remained so for more than twenty years after the said conveyance, understanding that he was occupying under the license. It

*Marshall v. Taylor* (1895), 1 Ch. 641; *Sexson v. Barker*, 50 N. E. Rep. 109; Ill. Cent. R. R. v. *Wakefield*, 50 N. E. Rep. 1002 (Ill.); *Erdman v. Corse*, 40 Atl. Rep. 107-109 (Md.); *Munroe v. Wilson*, 41 Atl. Rep. 240 (N. H.); *Worthley v. Burbank*, 45 N. E. Rep. 779 (Ind.); *Burr v. Smith*, 53 N. E. Rep. 469 (Ind.); *Allaire v. Ketcham*, 35 Atl. Rep. 900 (N. J. Ch.); *Richardson v. Watts*, 48 Atl. Rep. 184 (Me.).

For cases in which the possession was held to be adverse, see *Shaw v. Smithes*, 47 N. E. Rep. 523 (Ill.); *French v. Goodman*, 47 N. E. Rep. 737 (Ill.); *Knight v. Knight*, 53 N. E. Rep. 306 (Ill.); *Davidson v. Chicago*, 53 N. E. Rep. 367 (Ill.); *Allen v. Van Bibber*, 43 Atl. Rep. 758 (Md.); *Trustees v. Hilken*, 35 Atl. Rep. 9 (Md.).

For cases in which the possession was held not to be adverse, see *Harms v. Kranz*, 47 N. E. Rep. 746, 749 (Ill.); *Mitchell v. Prepont*, 35 Atl. Rep. 496 (Vt.); *Reuter v. Stuckart*, 54 N. E. Rep. 1018 (Ill.); *Ulman v. Co.*, 34 Atl. Rep. 366 (Md.).

<sup>1</sup> *Harrison v. Dolan*, 172 Mass. 395. See further, *Perry v. Yancy*, 179 Mass. 183.

<sup>2</sup> *Batchelder v. Robbins*, 45 Atl. Rep. 837 (Me.).

<sup>3</sup> *Maxwell Land Co. v. Dawson*, 151 U. S. 586.

<sup>4</sup> *Bond v. O'Gara*, 177 Mass. 139.

was held that as he meant to continue to occupy under the license, there was no adverse possession, although the conveyance terminated the license, and that an adverse title had not been gained.

We saw, under the head of prescription, that a parol grant is a good foundation for a user to ripen into a prescriptive right, and the same principle applies under the statute of limitations, and a parol grant is a good foundation for a subsequent adverse possession.<sup>1</sup>

The mere fact that a person claiming to have acquired title by adverse possession has been assessed and has paid the taxes, is not admissible as tending to show that his possession was adverse; but if there be other evidence tending to show that his possession was adverse, this fact may be admitted for that purpose.<sup>2</sup>

If there be a conveyance of a tract of land, and the deed be recorded, and the grantee occupies only a part of the land for over twenty years, the period of the statute of limitations, he acquires title to the entire tract; this is called acquiring title by adverse possession under color of title.<sup>3</sup> Of course he could not acquire title to the part he had not occupied if the real owner were during that time in possession of it. It would be

<sup>1</sup> *Sumner v. Stevens*, 6 Met. 338; *Schafer v. Hanser*, 70 N. W. Rep. 136 (Mich.); *Williams v. Beam*, 46 Atl. Rep. 432 (Penn.).

<sup>2</sup> *Whitman v. Shaw*, 166 Mass. 461. See further, *Hammond v. Abbott*, 166 Mass. 518, 540; *Butterfield v. Reed*, 160 Mass. 361; *Archibald v. N. Y. C. R. R.*, 52 N. E. Rep. 569 (N. Y.); *Carter v. Clark*, 42 Atl. Rep. 399 (Me.); *Tuttle v. Kilroa*, 177 Mass. 501.

As to payment of taxes in some jurisdictions, see *Bell v. Neiderer*, 48 N. E. Rep. 194 (Ill.).

<sup>3</sup> *Hopkins*, R. P. 461; *Jones*, R. P. §§ 129, 1573; 2 *Dembitz on Land Titles*, § 185; *Davenport v. Newton*, 42 Atl. Rep. 1087; *Fullam v. Foster*, 35 Atl. Rep. 484 (Vt.); *Proprietors of the Kennebec v. Laboree*, 2 Greenleaf, 275; *Foxcroft v. Barnes*, 29 Me. 128; *Kopp v. Herrman*, 33 Atl. Rep. 647, 648 (Md.); *Wilson v. Johnson*, 43 N. E. Rep. 930, 931 (Ind.); *Adams v. Clapp*, 32 Atl. Rep. 911, 912 (Me.); *Johns v. McKibben*, 40 N. E. Rep. 449 (Ill.); *St. Louis, etc. R. R. Co. v. Nugent*, 39 N. E. Rep. 264 (Ill.).

strange law for a man who is living on his farm to find that he has lost his property because, more than twenty years before, one man had given another man a deed of it, which deed had been recorded.

The law of Massachusetts concerning the statute of limitations, which has been understood as settled for many years, has been overruled in *Wishart v. McKnight*.<sup>1</sup> In this case the demandant in the writ of entry was the real owner of the land and had the record title. The disputed tract of land was contiguous to another tract of land, and this other tract had been conveyed to successive grantees by deeds, and these grantees had used the disputed tract of land in connection with the granted land. No one of these grantees had been in the possession of the disputed tract for twenty years, but if they could tack their possessions together, then the total possession would exceed twenty years. The disputed tract had never been mentioned in any one of the successive deeds. It was held that title had been acquired by adverse possession; the court left it in doubt whether the demandant would fail simply because he had been kept out of the possession for twenty years, regardless of any privity between the people keeping him out. But the court held that there was a privity between them, and further that a jury might infer that they had passed the possession of the disputed tract to each other in succession, although there was in terms no evidence of any contract to that effect between them, either oral or in writing.

In *Percival v. Chase*<sup>2</sup> a wall had been constructed by the owner of an adjoining lot of land upon his neighbor's land. It was held that the grantee of the neighbor's land could not maintain trespass *quare clausum*, without first entering upon the disputed tract. It was held, also, that if a certain tract of land has been for more than twenty years adversely

<sup>1</sup> *Wishart v. McKnight*, 178 Mass. 356. See also *Jordan v. Riley*, 178 Mass. 524.

<sup>2</sup> *Percival v. Chase*, 182 Mass. 371.



occupied by the owner of an adjoining lot, and such owner conveys to the plaintiff the adjoining lot, the owner of the record title (disseisee) having been thus barred, the said grantee, if he uses the disseised tract, has a title good as against everybody except his own grantor.

## CHAPTER XXXII.

### INCORPOREAL RIGHTS RESUMED.

WE now return to the subject of incorporeal rights in land, and having shown under a discussion of prescription that that is one of the ways by which incorporeal rights in land may be acquired, we will now consider another method by which they may be acquired, namely, by implied grant and by implied reservation.

If a man conveys a part of his land and the grantee claims that by virtue of the conveyance he has some incorporeal right or other in the retained land by implication, this is by implied grant. If, on the other hand, the grantor claims that he has some such right by implication in the granted land in favor of the retained land, this is by implied reservation. Now, that there should be any implied grant or any implied reservation, there must be some necessity;<sup>1</sup> and there are two kinds of necessity, which we shall presently consider, strict necessity and reasonable necessity. Whether a given state of facts would support a contention for an implied grant, and if so, whether a corresponding state of facts would support a contention for an implied reservation, depends upon the circumstances; but it is safe to say that so far as there is a difference, it is in favor of the implied grant,<sup>2</sup> and this is very reasonable, because the grantee does not make or sign the deed. If the grantor wants to reserve something, he can write it into the deed instead of claiming it by implication.

Now, in the list of items constituting the requirements of

<sup>1</sup> Goddard on Easements (Bennett's ed.) 124.

<sup>2</sup> Wash. on Easements (4th ed.) 54; Jones on Easements, §§ 128, 154.

prescription, we found the word "continuous." This word is used in that connection in its popular sense. But the word "continuous" is used in the law of implied grants and implied reservations in a technical sense. Anything which does not require the agency of man to keep it going is called "continuous," for instance, a drain, an aqueduct, or a water spout; whereas a right of way is called discontinuous or non-continuous, because it requires the agency of man to keep it going. There must be, in other words, some travel over the way if one is to use it.<sup>1</sup> Now, it is a great point in the law of implied grants and implied reservations that the thing which it is claimed has passed by implication was an apparent thing and that it was continuous;<sup>2</sup> but many things may pass by implied grant or implied reservation which cannot be called, strictly speaking, continuous. For instance, in *Brown v. Alabaster*<sup>3</sup> it was held that a way which was in use by the owner of premises over another part of his land will pass by implied grant in a conveyance of the first mentioned premises, although there was another access to the premises than over that way. The way was between walls, and it was entered through a gate. These facts, that it was thus "a formed road," and moreover had a gate, are the turning point of the decision. It is thus perceived that the thing in use in this case was not of a continuous character, although it was apparent. In some cases the element of a formed road has not been relied upon, or the element that any easement, whatever it may be, is continuous; but only that the easement claimed is an existing thing, is apparent, designed to be permanent, and is reasonably necessary, although not

<sup>1</sup> Wash. on Easements (4th ed.) 13, 14, 107, 426.

<sup>2</sup> Wash. on Easements (4th ed.) 81, 95; *Greer v. Van Meter*, 33 Atl. Rep. 794 (N. J.); Jones on Easements, § 154; *Whiting v. Gaylord*, 34 Atl. Rep. 85 (Conn.); *McElroy v. McLeay*, 45 Atl. Rep. 898 (Vt.); *Whalen v. Manchester Co.*, 47 Atl. Rep. 443 (N. J.).

<sup>3</sup> *Brown v. Alabaster*, 37 Ch. Div. 490. See *Roe v. Siddons*, 22 Q. B. D. 224; *Thomas v. Owen*, 20 Q. B. D. 225; *Ford v. Metropolitan Co.*, 17 Q. B. D. 27, 28.

a matter of necessity strictly, to the use of the premises granted.<sup>1</sup>

In Massachusetts the rule is very strict, and it is held that the courts will not raise an implied grant, much less would they, we think, an implied reservation, unless there be a strict necessity. They make an exception in the case of rights of way by necessity, in which case a reasonable necessity is all that is required.<sup>2</sup> We must explain this. If a man conveys a part of his land and locks up from convenient access to the highway another piece of his land, there is a right of way by implied reservation over the granted land to the road; and conversely, if he sells the interior land, there is an implied grant.<sup>3</sup> Now what must be the necessity? The answer is, not strict necessity necessarily, but reasonable necessity is sufficient. A strict necessity is when no substitute can be found. A reasonable necessity is when a substitute can be found, but not without unreasonable labor or expense.<sup>4</sup> Now, in the above cases, if a man could get out to the road in some other way than over the other piece of land, but could not do so without unreasonable labor or expense, then there would be a reasonable necessity that he should have a way over the other piece of land.

In *Buss v. Dyer*,<sup>5</sup> the owner of two lots built a house on

<sup>1</sup> *Baker v. Rice*, 47 N. E. Rep. 656 (Ohio); *Eliason v. Grove*, 36 Atl. Rep. 844 (Md.); *Horner v. Keene*, 52 N. E. Rep. 495 (Ill.).

<sup>2</sup> Wash. on Easements (4th ed.) 107-109; *Davis v. Spaulding*, 157 Mass. 438, 439; *Worther v. Garno*, 182 Mass. 243; *Claffin v. Boston & Albany R. R.*, 157 Mass. on p. 496; *Boland v. St. John's Schools*, 163 Mass. 229; *Cummings v. Perry*, 169 Mass. 155.

<sup>3</sup> *Richards v. Attleborough R. R.*, 153 Mass. 122; *Palmer v. Palmer*, 44 N. E. Rep. 966 (N. Y.); *Willey v. Thwing*, 34 Atl. Rep. 428 (Vt.).

<sup>4</sup> And see Judge Bennett in *Goddard on Easements* (Bennett's ed.) 270. See also *Pettingill v. Porter*, 8 Allen, 6, 7; *Baker v. Rice*, 47 N. E. Rep. 653, 656 (Ohio).

<sup>5</sup> *Buss v. Dyer*, 125 Mass. 287. See further, *Whyte v. Builders' Co.*, 58 N. E. Rep. 517 (N. Y.). See *Larsen v. Peterson*, 30 Atl. Rep. 1094 (N. J.). There is no implied grant of an easement which does not actually belong to the estate conveyed. Thus, there is no implied grant of a

each, with one chimney in common, which, however, was built wholly upon one of the lots. He simultaneously conveyed the one lot to A and the other lot to B. A, upon whose lot the chimney was built, took it down. It was held that there was no easement by implication in favor of the lot of B. The jury found that B could build a chimney on his own land at a reasonable cost. The deeds to A and to B were with "all rights, easements, privileges, and appurtenances," and with the covenant against incumbrances, etc. The court says that in Massachusetts "grants by implication" are limited to cases of strict necessity; and stress is laid upon the fact that the respective deeds contained covenants.

When the property conveyed is by the description of house, messuage, farm, manor, or mill, whatever has been used with the premises on another piece of the grantor's land, is more likely to pass by implied grant than when the premises conveyed are described by metes and bounds,<sup>1</sup> and this is very reasonable, because the describing the land as above indicates that it is his house, his farm, his mill, etc., with its usual adjuncts, which he intends to convey, more than it does when he describes the land merely by metes and bounds.

It is said to be an open question whether there is any difference in respect to raising an implication when a man conveys a mill and retains the flowed lands, or when he conveys the flowed lands and retains the mill;<sup>2</sup> but as before mentioned, there is a greater tendency to discover an implied grant than there is to discover an implied reservation.

The following are standard cases illustrative of some of

right to use a public sewer, if the house on the estate conveyed has been by a former owner of the premises unlawfully connected with the sewer. *Burnstead v. Cook*, 169 Mass. 410, 412.

<sup>1</sup> *Adams v. Marshall*, 138 Mass. 236; *Carbrey v. Willis*, 7 Allen, 364; *Jarvis v. Seele Co.*, 50 N. E. Rep. 1044 (Ill.). See further, *In re Brightsmith*, 31 Ch. Div. 317.

<sup>2</sup> Wash. on Easements (4th ed.) 54.

these propositions and will be found cited down through the years. *Seymour v. Lewis*<sup>1</sup> was a case in which a man owned a spring and a mill, and the spring was useful in the operation of the mill; he sold the spring, and it was held that the right to use the spring remained in the grantor by implied reservation. The thing in use was here open, apparent, and of a continuous character. *Pyer v. Carter*<sup>2</sup> was a case in which a man owned two houses which adjoined each other, and there was a drain which passed under one of them for the use of the other of them. He sold the house under which the drain passed. It was held that he had a right to use the drain for the benefit of the other house by implied reservation. Now this case has been immensely criticised on the ground that there was no such strict necessity as would warrant the raising of an implied reservation, whatever might have been true had the case been reversed and the claim set up of an implied grant.<sup>3</sup> Then there is the old case of *Nicholas v. Chamberlain*.<sup>4</sup> In that case it was held upon demurrer, that if one erect a house and build an aqueduct from a spring on another part of his land to the house and afterward sell the house with the appurtenances, but not the land containing the spring, or sell the land, reserving to himself the house, the privilege of the aqueduct goes with the house. *Lampman v. Milks*<sup>5</sup> is one of these cases cited over and over again. The facts were that a man diverted a stream of water which ran through his land and thereby rendered fit for building purposes a piece of his

<sup>1</sup> *Seymour v. Lewis*, 13 N. J. 439, cited in Wash. on Easements (4th ed.) 54, 70, 81.

<sup>2</sup> *Pyer v. Carter*, 1 H. & N. 916, cited in Wash. on Easements (4th ed.) 78, 95.

<sup>3</sup> See Wash. on Easements (4th ed.) 72, 75, 78, 104, 105; *Buss v. Dyer*, 125 Mass. on p. 291; *Union Co. v. London Co.* (1901), 2 Ch. 300, affirmed on appeal (1902), 2 Ch. 557. *Pyer v. Carter* has been approved in *Larsen v. Peterson*, 30 Atl. Rep. 1094 (N. J.), on p. 1097. See further, *Bunting v. Hicks*, 96 Law Times Mag. 461.

<sup>4</sup> *Nicholas v. Chamberlain*, Cro. Jac. 121.

<sup>5</sup> *Lampman v. Milks*, 21 N. Y. 505, cited in Wash. on Easements (4th ed.) 87, 88.

land which had been flooded. He sold the improved land and afterward other land, and the party who bought the other land turned the water back. It was held that he had no right to do so, for that when the man bought the improved land the benefit was apparent, open, and visible, and that had it been a burden instead of a benefit there would have been no question for the court.

We will now consider several of the most common kinds of easements, and first we will take up rights of way,<sup>1</sup> confining our attention chiefly to private ways. The general rule is that a right of way, in order to be anything more than a right under a mere license, must be appurtenant to land, so that it must be a real easement. This does not mean that the public may not acquire a right of way, but it does mean that a right of way in gross has no stronger foundation than a mere license under which it is acquired.<sup>2</sup> But in Massachusetts the law is otherwise, and in that State a grant by deed of a right of way to A and his heirs will give a property right which cannot be revoked, although there is no dominant tenement.<sup>3</sup>

As to the strictness with which rights of way are interpreted, perhaps the following illustration will throw as much light as any attempt to formulate a rule might do. In Daven-

<sup>1</sup> In taking property under the right of eminent domain, the legislature may determine in the act authorizing the taking, whether an absolute estate or only an easement shall be taken. In taking land for highways, the legislature has not deemed it necessary to take more than an easement. *Dingley v. Boston*, 100 Mass. 560; *Page v. O'Toole*, 144 Mass. 303; *Harback v. Boston*, 10 Cush. 295; *Lewis on Eminent Domain*, § 277; *Mills on Eminent Domain*, § 50; *Googins v. Boston & Albany R. R.*, 155 Mass. 505; *Titus v. Boston*, 161 Mass. 209. And so in the case of railroads, *Harback v. Boston*, 10 Cush. 295; *Lewis on Eminent Domain*, § 278.

<sup>2</sup> *Wash. on Easements*, 11, 12, (ed. of 1885); 2 *Leake*, 190, 191, 196, 197, 265; *Simpson v. Godmanchester Co.* (1897), App. Cas. 707, 708.

<sup>3</sup> *Goodrich v. Burbank*, 12 Allen, 460, 461; *White v. Crawford*, 10 Mass. 188; *Bowen v. Conner*, 6 Cush. 137; *Dennis v. Wilson*, 107 Mass. 592, 593; *Kennedy v. Owen*, 136 Mass. 202, cited in *Goddard on Easements* (Bennett's ed.), 15, note k; *Wash. on Easements*, 9, 81, note 2; *Lincoln v. Commonwealth*, 164 Mass. 10; *Jones on Easements*, § 42. See *Currier v. Studley*, 159 Mass. 24.

port *v. Lamson*<sup>1</sup> there were three lots of land, A, B, and C. One man owned A ; another B and C. There was an easement, created by deed, to haul the produce of lot B over lot A. There was no fence between B and C, and the owner filled up his hay-cart with hay made indiscriminately on B and C, and hauled it over A. It was held that he had no right to haul over lot A the produce of lot C. But if there be a right to use a way for steam power and horse power, now that electricity has come into use, there is a right to use it for electric power also.<sup>2</sup> In *Baldwin v. Boston & Maine R. R.*<sup>3</sup> a way by prescription had been acquired from a lot of land on which there was one house to a railroad station. After the prescriptive right had become effective, more houses were built on the land and more people came to use the way. It was held that the right to use the way was extended to the increased use made of it.

A very interesting question has arisen within a few years as to the power of the public to get a right by prescription over a private way, in this case a way over a railroad. Of course, it would be very difficult to exclude the public from using a way which has to be kept open for the benefit of persons entitled to use the way, and the Massachusetts court holds that to entitle the public in such a case to acquire a right by prescription, something more must appear than merely that the public had used the way for more than twenty years.<sup>4</sup> But turning from rights claimed by the public, the fact that certain persons have a right of way by grant does not prevent other persons from acquiring a prescriptive right to the use of the way.<sup>5</sup>

<sup>1</sup> *Davenport v. Lamson*, 21 Pick. 72. See also *Greene v. Canny*, 137 Mass. 64, cited in 4 Shars. & Budd, 213 ; *U. S. Co. v. Delaware R. R.*, 41 Atl. Rep. 767, 768.

<sup>2</sup> *Tallon v. Hoboken*, 37 Atl. Rep. 897 (N. J.).

<sup>3</sup> *Baldwin v. Boston & Maine R. R.*, 181 Mass. 166.

<sup>4</sup> *Sprow v. Boston & Albany R. R.*, 163 Mass. 330, 340.

<sup>5</sup> *Ballard v. Demmon*, 156 Mass. 449 ; *Sprow v. Boston & Albany R. R.*, 163 Mass. 330.



Next as to rights of way by necessity, we have above referred to this subject and have explained what is meant by a right of way by necessity. In Maine, it has been recently held that if a man grant a piece of land, to which there is access by sea, there can be no way by necessity over the grantor's land, for that the means of getting to the land by the sea is enough.<sup>1</sup> In respect to rights of way by necessity, the owner of the servient estate has the right to locate the way, as he ought to have; but if he does not locate it conveniently to the owner of the dominant estate, then the latter may locate it.<sup>2</sup> A right of way by necessity ceases with the

<sup>1</sup> Jones on Easements, § 320; Hildreth v. Googins, 39 Atl. Rep. 550 (Me.).

We think the following case will show that this doctrine would not be favorably regarded in Massachusetts: Grammar School v. Proprietors, 174 Mass. 572. See further: Jay v. Michael, 48 Atl. Rep. 61 (Md.).

<sup>2</sup> 2 Black. Com. 79, 80. (Hammond's ed.); Brown v. Alabaster, 37 Ch. Div. 490; Jeune v. Piper, 38 Atl. Rep. 147; Ritchey v. Welsh, 48 N. E. Rep. 1031 (Ind.).

If a highway be out of repair from temporary causes, a traveller can go *extra viam* on to the adjoining lands in order to pass, without being guilty of trespass. Campbell v. Race, 7 Cush. 408.

But one who has a right to a private way cannot go *extra viam* if the way be out of repair, unless it should be the duty of the owner of the servient tenement to repair, and he had failed to do so. Ordinarily it is the business of the owner of the dominant tenement to keep the way in repair. 2 Wash. R. P. 55; Wash. on Easements, (ed. of 1865) 293, 294.

And there is the right, not limited to ways, but generally, on the part of the owner of the dominant tenement, to enter upon the land of the owner of the servient tenement, and make necessary repairs. Goddard on Easements (Bennett's ed.) 285, 295, 346; Wells v. Tolman, 51 N. E. Rep. 271 (N. Y.); Wessels v. Colebank, 51 N. E. Rep. 641 (Ill.); Bradley v. Warner, 41 Atl. Rep. 564 (R. I.).

A covenant by an owner of land with a town to keep a highway in repair may run with the land, thus binding a subsequent owner of the land to pay the expense of keeping the highway in repair. The gist of the principle seems to be that the covenant is not made with a private individual but with a permanent institution, namely, the town. Inhabitants of Middlefield v. Church Mills Co., 160 Mass. 267.

It was held in Rundle v. Hearle (1898), 2 Q. B. 83, that if the owner of the servient tenement has made repairs upon a mere footpath, which he himself was accustomed to use, this does not of itself prove an obliga-

necessity,<sup>1</sup> so that if a way by necessity has been used for over twenty years, and then a road should be constructed, which should give convenient access to the dominant estate, the right to further use the way by necessity would not exist.

In *Allen v. City of Boston*,<sup>2</sup> a man had made an excavation under the sidewalk, so that he considerably enlarged the area of his basement. The city of Boston negligently allowed a sewer that ran through the street to leak, so that damage was done in this excavated portion. The city was held liable in damages. The principle is, that an abutter has a right to use the space under the street or road, assuming that his title runs to the centre of the street or road, as it generally does, in so far as he does not interfere with the public use of the street or road, and that his rights may grow less and less as the public needs increase. The public rights involve the travel over the surface, and the right to use the region beneath the surface, for sewers, gas pipes, water pipes, etc. Moreover the right of the abutter is not confined to the use of the region beneath the surface, for in the country, where the roads are sometimes wide and the travelled space occupies a small part of the space between the walls or fences, an abutter may often use the surface of the road for his own private purposes, taking care that he does not obstruct travel or interfere with the actual, reasonable use of the road by the public.<sup>3</sup>

tion to do so as to the public, which has the right to use the foot path. It is doubted in the above case whether the owner of the servient tenement can be bound to make repairs as to the public, merely because he is such owner, that is, *ratione tenuræ*.

<sup>1</sup> 2 Black. Com. 80 (Hammond's ed.).

A prescriptive public way, which has been extinguished by the location of a highway, does not revive upon the discontinuance of the highway. *In re Railroad Crossing*, 39 Atl. Rep. 478 (Me.).

<sup>2</sup> *Allen v. City of Boston*, 159 Mass. 324.

<sup>3</sup> *Burr v. Stevens*, 38 Atl. Rep. 547, 548 (Me.); *Postal Co. v. Eaton*, 49 N. E. Rep. 366, 367; *Huffman v. State*, 52 N. E. Rep. 715 (Ind.); *Parish v. Baird*, 54 N. E. Rep. 724 (N. Y.).

The almost universal rule in the United States is that the right to light and air cannot be acquired by prescription.<sup>1</sup> In Massachusetts, not only is this expressly held by the court, but there is a statute also, providing against the acquisition of an easement in light and air by prescription.<sup>2</sup> But even in Massachusetts it is held that a landlord has no right to erect a structure which will materially interfere with the light and air required by his lessee.<sup>3</sup> Now an easement in light and air is a right which has reference to windows in a building, and it is held that if a building, in favor of which there is an easement in light and air, be torn down and a new building be erected with windows which correspond in location to those of the old house, the easement in light and air continues to exist for the benefit of the windows in the new house.<sup>4</sup> An interesting question has recently arisen in England, which is, whether an easement can be gained by prescription to have an excessive amount of light and air for trade purposes, that is to say, more light and air than is usually required for buildings. The lower court held that it could not be acquired, because, said the court, the land could not be improved by erecting high structures, but the Court of Appeals reversed the decision.<sup>5</sup> When there is no right to light and air, there is nothing to prevent a man's erecting a very high fence, even though he does so maliciously, shutting off his neighbor's light and air.<sup>6</sup> But in some of the states, there are statutes

<sup>1</sup> Goddard on Easements (Bennett's ed.) 202-210; 4 Shars. & Budd, 245; 37 Am. St. Rep. 184, note; *Trustees v. Shepard*, 46 Atl. Rep. 402 (R. I.).

<sup>2</sup> *Carrig v. Dee*, 14 Gray, 583; *Rogers v. Sawin*, 10 Gray, 376; *Fifty Associates v. Tudor*, 6 Gray, 255; *Keats v. Hugo*, 115 Mass. 204; *Christ Church v. Lavezzolo*, 156 Mass. 89, 92.

<sup>3</sup> *Case v. Minot*, 158 Mass. 577. See further, *Corbett v. Jonas* (1892), 3 Ch. 137.

<sup>4</sup> *Smith v. Baxter* (1900), 2 Ch. 138; 2 Leake, 308. As to easements of ventilation, see *Bass v. Gregory*, 25 Q. B. D. 481.

<sup>5</sup> *Warren v. Brown* (1900), 2 Q. B. 722. Reversed on appeal as above (1902), 1 K. B. 15.

<sup>6</sup> *Letts v. Kessler*, 42 N. E. Rep. 765 (Ohio).

which prohibit the erection of a high fence under certain circumstances.<sup>1</sup>

Next as to implied grant and implied reservation. The American law is unsettled as to whether there can be an implied grant of light and air,<sup>2</sup> but in Massachusetts it is held that there cannot be.<sup>3</sup> But it is settled, both in England and in the United States, that there is no right to light and air by an implied reservation.<sup>4</sup> Such a case would be one in which a man sells a part of his land and retains a lot with a house near the border with windows overlooking the granted lot, which is vacant.

The right to light and air is very extensive in England, and the following case very well illustrates the great favor shown the privilege of light and air in that country. A man owned some land with a house on it. There were windows overlooking a vacant lot which also belonged to him. He devised one lot to A and the other to B, and it was held that the devisee of the vacant lot could not build so as to obstruct the access of the light and air to the windows of the house.<sup>5</sup>

An easement in light and air may be lost, by the owner of the adjoining land acquiring a right by prescription to obstruct the light and air.<sup>6</sup> The right to light, air, and prospect, as, for instance, to have a bluff on the seashore unobstructed by any building, so that the public may have the view, can be created by dedication.<sup>7</sup>

The right to the lateral support of the soil by the adjoining

<sup>1</sup> Mass. R. L. ch. 130, § 1; *Lord v. Langdon*, 39 Atl. Rep. 552 (Me.); *Lovell v. Noyes*, 46 Atl. Rep. 25 (N. H.).

<sup>2</sup> *Goddard on Easements* (Bennett's ed.) 192-202; *Greer v. Van Meter*, 33 Atl. Rep. 794 (N. J.); *Robinson v. Clapp*, 32 Atl. Rep. 939 (Conn.).

<sup>3</sup> *Keats v. Hugo*, 115 Mass. 204; *Baker v. Willard*, 171 Mass. 227.

<sup>4</sup> *Goddard on Easements* (Bennett's ed.) 192-202; *Beddington v. Atlee*, 35 Ch. Div. 317; *Russell v. Watts*, 10 App. Cas. 596.

<sup>5</sup> *Phillips v. Low* (1892), 1 Ch. 47, 50. See further, *Corbett v. Jonas* (1892), 3 Ch. 145; *Taws v. Knowles* (1891), 2 Q. B. 564.

<sup>6</sup> *Lewis v. N. Y., etc., R. R.*, 56 N. E. Rep. 541 (N. Y.).

<sup>7</sup> *Atty.-Gen. v. Vineyard Grove Co.*, 181 Mass. 507.

soil is a natural right and is not an easement, so that if the neighbor excavate and cause the soil of the other man's land to cave in, there is a remedy in damages, provided any damages have been suffered. A very simple case in which there might be a material injury would be if there were a way near the border and this should cave in. But if the land be subject to pressure, either by a building or by shrubbery, there is no liability for excavating so as to cause the soil to subside by virtue of the pressure, unless the excavation was done negligently.<sup>1</sup> Now if a man is about to make an excavation in his own land, it is his duty to notify his neighbor whose building is so near the border as to make it in danger of settling, and then it becomes the duty of the owner of the building to shore his building up so as to protect it.<sup>2</sup>

We are here obliged to anticipate by referring to percolating water. Percolating water is water which sifts through the soil underground and does not flow in any definite subterranean channel. Percolating water is said to belong to the owner of the land in which it at any time may happen to be, so that he can dig a well and drain his neighbor's well without being liable in damages. In New Hampshire it was held, a good many years ago, that this right was not so extensive as it was generally considered to be. But a fair construction of the New Hampshire case shows that all that is meant is that a man must act reasonably with reference to his neighbor in the matter of percolating water.<sup>3</sup> Now in

<sup>1</sup> *Gilmore v. Driscoll*, 122 Mass. 199; *Foley v. Wyeth*, 2 Allen, 132, 133; *Larson v. Metropolitan Co.*, 110 Mo. 234; 33 Am. St. Rep. 439, 446 note, *et seq.*; *Cabot v. Kingman*, 166 Mass. 403; *Bohrer v. Dienhart Co.*, 49 N. E. Rep. 296 (Ind.); *Bohrer v. Dienhart Co.*, 45 N. E. Rep. 668 (Ind.); *Gobeille v. Meurier*, 41 Atl. Rep. 1001 (R. I.); *Church v. Paterson Ry. Co.*, 43 Atl. Rep. 696 (N. J.); *Spohn v. Dives*, 34 Atl. Rep. 192 (Penn.); *Witherow v. Tannehill*, 44 Atl. Rep. 1088 (Penn.).

<sup>2</sup> *Jones on Easements*, § 610, *et seq.*; *Bohrer v. Dienhart Co.*, 49 N. E. Rep. 299 (Ind.); *Bonaparte v. Wiseman*, 42 Atl. Rep. 918 (Md.); *Church v. Paterson Ry. Co.*, 43 Atl. Rep. 696 (N. J.).

<sup>3</sup> *Bassett v. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439; *Ballard v. Tomlinson*, 29 Ch. Div. 115.

*Cabot v. Kingman*<sup>1</sup> the defendant caused the soil of the plaintiff to sink, and his building to settle, by pumping out from his land a liquid substance, and the question was whether this substance was soil or water; for if it was water, there would be no remedy, but if it was soil, and the act was done negligently, then there would be a remedy. The court held that the substance must be regarded as soil, and the act being done negligently, there was a remedy. The above decision of the Massachusetts court in *Cabot v. Kingman* has been followed in England in *Jordeson v. Sutton Co.*,<sup>2</sup> in which it is expressly relied upon.

Where a man owned a dock and a wharf and supported the dock by rods carried to and fastened to the wharf, and the rods and fastenings were mostly concealed from view, and afterward sold the servient estate (the wharf), and later sold the dominant estate (the dock), it was held that there was no implied reservation of the right to continue the support of the dock; and it was held further that the support was *clam*, that is, secret, so that no right was gained by prescription through a user of more than twenty years after the servient estate had been sold.<sup>3</sup> The better opinion is that in America the right to the support of buildings, etc., cannot be acquired by prescription.<sup>4</sup> As to implied grant and implied reservation, suppose that a man has a building and sells the building, retaining the adjoining land, or sells the adjoining land, retaining the building, there is an implied grant and equally an implied reservation, as the case may be; and so, if there be two buildings which mutually support each other, and the

<sup>1</sup> *Cabot v. Kingman*, 166 Mass. 403; 10 Harv. Law Rev. 183.

<sup>2</sup> *Jordeson v. Sutton Co.* (1899), 2 Ch. 217, 240; *Trinidad Co. v. Am-bard* (1899), App. Cas. 594.

<sup>3</sup> *Union Co. v. London Co.* (1901), 2 Ch. 300. Affirmed on appeal (1902), 2 Ch. 557.

<sup>4</sup> *Goddard on Easements* (Bennett's ed.) 231 *et seq.*, 4 Shars. & Budd, 266, 268; Gray, C. J., in *Gilmore v. Driscoll*, 122 Mass. 207; 33 Am. St. Rep. 446 note, *et seq.*

owner sell one, there is an implied grant or an implied reservation as the case may be.<sup>1</sup>

As to party walls, the better opinion is that the parties do not own the wall as tenants in common, but that each owns that part of the wall which stands on his land, and that there are cross easements.<sup>2</sup> If a party wall be destroyed by fire and be reconstructed by both parties, without any new agreement, the old easements are revived.<sup>3</sup> The ordinary rule in respect to party walls is, in order for a covenant or contract to run with the land even in equity, both the benefit and the servitude must run with the land; in other words, it cannot be in gross on the one side and run with the land on the other side.<sup>4</sup>

The right to take water in its natural state is not a *profit à prendre*.<sup>5</sup> The reason assigned for this principle is that water is not a part of the soil, nor of the product of the soil, but that it is supplied and renewed by nature.<sup>6</sup> But in Massachusetts it is held that the right to take water from a spring may be conveyed in gross so as to be assignable and inheritable.<sup>7</sup> But if there be a grant of a right to take water which is in a well or cistern, this is a good *profit à prendre*,<sup>8</sup> and it is held in England that it is larceny at common law to tap a pipe, to draw water which is measured by a meter.<sup>9</sup>

As to the rights of a riparian proprietor upon a natural

<sup>1</sup> 4 Shars. & Budd, 268.

<sup>2</sup> Everett v. Edwards, 149 Mass. 590, 592, 593; Normille v. Gill, 159 Mass. 427.

<sup>3</sup> Douglas v. Coonley, 51 N. E. Rep. 283 (N. Y.). See Pierce v. Dyer, 109 Mass. 377.

<sup>4</sup> Lincoln v. Burrage, 177 Mass. 378. See further, Jones on Easements, §§ 668-677, 678 *et seq.*

<sup>5</sup> 2 Leake, 330, 331.

<sup>6</sup> 2 Leake, 330, 331.

<sup>7</sup> Amidon v. Harris, 113 Mass. 59; Owen v. Field, 102 Mass. 90; Goodrich v. Burbank, 12 Allen, 459; Goddard on Easements (Bennett's ed.) 10; Washburn on Easements, 10; 2 Black. Com. 77, 418-420 (Hammond's ed.); Blood v. Millard, 172 Mass. 65.

<sup>8</sup> Jones on Easements, § 55.

<sup>9</sup> Ferrens v. O'Brien, 11 Q. B. D. 21.

stream, he has a natural right to use the water which flows by or through his land to any reasonable extent. He may dam it up and have a mill; he also may consume the water for domestic purposes and for his cattle, and in this latter respect he is not obliged to consider other riparian owners lower down on the stream in case at any time there be a deficiency of water.<sup>1</sup> He may also use the water for the purposes of irrigation.<sup>2</sup> But it was held in *Ware v. Allen*<sup>3</sup> that he has no right to construct a pond back of his dam for storing the water of the stream to the detriment of other mill owners below. A riparian proprietor may divert the waters of the stream, provided he returns the water to the stream,<sup>4</sup> and he may acquire by prescription, rights as to diverting the water in excess of the right just mentioned.<sup>5</sup> The principles governing the right of a riparian proprietor to divert the waters of a natural stream have recently been applied in England to the waters of an artificial stream.<sup>6</sup> It is held that a riparian owner cannot confer upon a non-riparian owner separately from the land, as against other riparian owners, a right to take the water of the stream.<sup>7</sup> A municipality which buys a place on a bank of a stream several miles from its corporate limits

<sup>1</sup> *Bailey v. Clark* (1902), 1 Ch. 649; *North Shore Ry. Co. v. Pion*, 14 App. Cas. 619-622; 2 Leake, 148, 151, 152; *Young v. Bankier Co.* (1893) App. Cas. 691; *Commissioners v. Hugo*, 10 App. Cas. 344, 345; *Philadelphia, etc., R.R. v. Pottsville Co.*, 38 Atl. Rep. 404 (Penn.); *Simmons v. Paterson*, 42 Atl. Rep. 750 (N. J. Ch.).

<sup>2</sup> 2 Leake, 151.

<sup>3</sup> *Ware v. Allen*, 140 Mass. 513.

<sup>4</sup> *Valparaiso Co. v. Dickover*, 46 N. E. Rep. 593 (Ind.); *Fosgate v. Hudson*, 178 Mass. 225.

<sup>5</sup> 2 Leake 151; *McIntyre v. McGarvin* (1893), App. Cas. 268; *Irving v. Media*, 45 Atl. Rep. 482 (Penn.).

<sup>6</sup> *Bailey v. Clark* (1902), 1 Ch. 649.

<sup>7</sup> *Rudolph v. R. R. Co.*, 40 Atl. Rep. 1086 (Penn.). *Contra*, *Gillis v. Chase*, 31 Atl. Rep. 18 (N. H.).

It was held in *Roberts v. Gwyrfai Council* (1899), 1 Ch. 583, affirmed on appeal (1899), 2 Ch. 608, that a riparian proprietor has a right to have a party enjoined from interfering with the flow of a natural stream, although he has as yet suffered no sensible damage.



has no right to supply its inhabitants from the stream as a riparian owner.<sup>1</sup>

Next as to polluting the waters of a natural stream. A riparian owner has no right to do this. *Booth v. Ratté*<sup>2</sup> was a case which went to the Privy Council of England from Canada. It was held that a man who had a boathouse on a natural stream and let his boats could recover damages from a mill owner above, who had impeded the navigability of the stream by discharging chips, etc., into the water. There is a number of late cases in this country in which the principle of *Booth v. Ratté* has been followed, some of which relate to the pollution of a natural stream by the discharge of sewerage into it.<sup>3</sup> But in Massachusetts, in *Merrifield v. Worcester*,<sup>4</sup> it is held that if a city has legislative authority to construct sewers for the discharge of sewerage into a natural stream, there is no remedy for the riparian owners, provided that the sewers were properly constructed and a reasonable use of them was made. This is rather severe doctrine, because the property of the riparian owners is taken for a public use, without making compensation therefor; that is to say, their property right in the use of the water is taken without making compensation therefor.

The general doctrine is, that prior occupancy upon a natural stream by the use of a mill and dam does not confer any superior right.<sup>5</sup>

<sup>1</sup> *Sparks Co. v. Newton*, 41 Atl. Rep. 385 (N. J. Ch.); *Roberts v. Gwyrfai Council* (1899), 2 Ch. 608.

<sup>2</sup> *Booth v. Ratté*, 15 App. Cas. 188.

<sup>3</sup> *Beach v. Sterling Co.*, 33 Atl. Rep. 286 (N. J. Ch.); *Jessup Co. v. Ford*, 33 Atl. Rep. 618 (Del.); *Muncie Co. v. Martin*, 55 N. E. Rep. 796 (Ind.); *Platt v. Waterbury*, 45 Atl. Rep. 154 (Conn.); *Watson v. New Milford*, 45 Atl. Rep. 167 (Conn.); *Weston Co. v. Pope*, 57 N. E. Rep. 719 (Ind.); *Gray v. Mayor*, 45 Atl. Rep. 995 (N. J.); *Strobel v. Kerr Co.*, 58 N. E. Rep. 142 (N. Y.); but see *Mayor v. Sayre*, 45 Atl. Rep. 985 (N. J.).

<sup>4</sup> *Merrifield v. Worcester*, 110 Mass. 216.

<sup>5</sup> *Gould on Waters* (2d ed.) §§ 226, 227.

But under the Mill Acts of Massachusetts and Maine, prior occupancy

Coming now to surface water, it is common law that a man has a right to discharge on his neighbor's land surface water which comes on his own land. He may do this by raising the level of his land or by erecting buildings which will shed the water so that it will run off on to the neighbor's land. Surface water is water which collects from rain or the melting of snow, or which settles on the land from the overflow of a stream. But a man has no right to turn the surface water on to his neighbor's land by constructing a ditch or other artificial channel. Now since the right to have surface with a mill and dam confers a superior right. The prior occupant can hold back the water so as to make it impracticable or impossible for a riparian owner down stream to run a mill, and a prior occupant may so flood the land of people up stream as to prevent a proprietor from getting a sufficient fall of water to run a mill.

*Cary v. Daniels*, 8 Met. 477; *Gould on Waters* (2d ed.) § 227; *Harv. Law Rev.* for Nov. 1893, 186; *Dean v. Colt*, 99 Mass. 486; *Gleason v. Assabet Mfg. Co.*, 101 Mass. 72; *Sumner v. Tileston*, 7 Pick. 198; *Fales v. Easthampton*, 162 Mass. 425.

In flooding lands of people up stream he is obliged to make compensation in damages. *Smith v. Agawam Co.*, 2 Allen, 356, 357; *Murdock v. Stickney*, 8 Cush. 114, 116; *Storm v. Munchang Co.*, 13 Allen, 13; *Williams v. Nelson*, 23 Pick. 142 *et seq.*; *Fales v. Easthampton*, 162 Mass. 425.

But if he has flowed their lands for more than twenty years without making compensation, this would be evidence of his having acquired a right by prescription to do so without paying for it. *Williams v. Nelson*, 23 Pick. 141; *Ludlow Co. v. Indian etc. Co.*, 177 Mass. 64.

But after all, the Massachusetts cases show that when the question arises as to a conflict of rights between two mill owners in the use of their water power with a mill and dam, the later proprietor may somewhat impair the use of the power to which the earlier one has been accustomed. *Gould v. Boston Duck Co.*, 13 Gray 442; *Smith v. Agawam Co.*, 2 Allen 355; *Dean v. Colt*, 99 Mass. 486.

And the Massachusetts cases also show that the use of water power by either of these proprietors, the earlier or later, must be reasonable. *Thurber v. Martin*, 2 Gray, 396, 397; *Gould v. Boston Duck Co.*, 13 Gray, 451; *Gould on Waters* (2d ed.) § 227.

And respecting water power, it is the law that if a mill owner has for more than twenty years used the power in excess of his rights, thereby diminishing the use of the power by other mill owners, he may acquire a prescriptive right. *Gould on Waters* (2d ed.) § 334; *Snow v. Parsons*, 28 Vt. 463; 2 Leake, 151, 152; *Hughesville Co. v. Person*, 38 Atl. Rep. 584 (Penn.).

water flow off one's land is a natural right, no easement is acquired by doing this for more than twenty years, and the other man can at any time put up a barrier to keep the surface water from flowing on to his land. This he may do, if he pleases, after the water has been turned on to his land for more than twenty years, but if it was turned on by a ditch or other artificial channel and this be continued for more than twenty years, a prescriptive right to do so, which is an easement, is gained.<sup>1</sup> In *Fitzpatrick v. Welch*,<sup>2</sup> it was held that a man has no right, in constructing a roof with a gutter, to turn the surface water on to his neighbor's land, and that it makes no difference that the roof and gutter were constructed with ordinary care.

Now the civil law obtaining in some states is very different from the common law above stated. By the civil law, the upper proprietor can compel the lower proprietor to receive the surface water,<sup>3</sup> and conversely the lower proprietor can claim as of right the privilege of having the surface water flow on to his land.<sup>4</sup>

In Massachusetts it is held that a town may construct a drain or artificial channel in the construction or repair of a road and turn such water off on to a man's land, without being liable to an action of tort.<sup>5</sup>

<sup>1</sup> *Rathke v. Gardner*, 134 Mass. 15, 16; cited in 4 Shars. & Budd, 339-341; *Smith v. Faxon*, 156 Mass. 589; *Walker v. New Mexico Co.*, 17 Sup. Ct. Reporter, 421; *New York, etc. Co. v. Hamlet Co.*, 47 N. E. Rep. 1061 (Ind.); *Baltimore Co. v. Hackett*, 39 Atl. Rep. 510 (Md.); *Thorntown v. Fugate*, 52 N. E. Rep. 763 (Ind.); *Jewett v. Sweet*, 52 N. E. Rep. 962 (Ill.); *Cleveland, etc. Ry. Co. v. Huddleston*, 52 N. E. Rep. 1008 (Ind.); *N. Y., etc., Co. v. Speelman*, 40 N. E. Rep. 541 (Ind.); *Lion v. Baltimore Co.*, 44 Atl. Rep. 1045 (Md.); *Beals v. Brookline*, 174 Mass. 20; *Guest v. Commissioners*, 45 Atl. Rep. 882 (Md.); *Flanders v. Franklin*, 47 Atl. Rep. 88 (N. H.).

<sup>2</sup> *Fitzpatrick v. Welch*, 174 Mass. 486.

<sup>3</sup> *Barkley v. Wilcox*, 86 N. Y. 140; cited in *Pattee's Illus. Cas. Part I.*, p. 12; *Gould on Waters* (2d ed.) § 266; *Walker v. New Mexico Co.* 17 Sup. Ct. Reporter, 421.

<sup>4</sup> *Gould on Waters* (2d ed.) § 266. See further, 21 L. R. A. 593 and note.

<sup>5</sup> *Holleran v. Boston*, 176 Mass. 75, 77.

We now come to percolating water. This is water which flows underground, sifting through the soil or rock in no defined channel; for a subterranean stream which flows in a defined channel is governed by the law as to surface streams.<sup>1</sup> As above mentioned, a man is considered to own the percolating water which is in his land.<sup>2</sup> This is peculiar, because water in its natural state is never owned, except in this case of percolating water. All that a man can own in water in a natural state, except in this case, is a right to the use of the water. The result is that a man can by digging a well upon his land, dry up his neighbor's well, because, the percolating water getting into his land, he is its owner.<sup>3</sup> But if water passes from a stream and percolates through a man's land, he has no right to draw off that water so as to lower the level of the stream.<sup>4</sup> In *Forbell v. City of New York*,<sup>5</sup> it was held that the city of New York had no right, by erecting a pump-

<sup>1</sup> Gould on Waters (2d ed.) § 281; *Tampa Co. v. Cline*, 20 So. Rep. 780 (Fla.); *Washington Co. v. Garver*, 46 Atl. Rep. 981 (Md.).

It is held in *Bradford Co. v. Ferrand* (1902), 2 Ch. 655, that a subterranean stream, assumed for the purposes of the case to be flowing in a defined channel, is not governed by the law of surface streams, but is to be treated as percolating water, if the fact cannot be ascertained without making excavations.

<sup>2</sup> Gould on Waters (2d ed.) § 280; 4 Shars. & Budd, 336; *Davis v. Spaulding*, 157 Mass. 435; *Brown v. Kistler*, 42 Atl. Rep. 885 (Penn.). But see *Ballard v. Tomlinson*, 29 Ch. Div. 115.

<sup>3</sup> 4 Shars. & Budd, 335, 336; *Davis v. Spaulding*, 157 Mass. 431; *M'Nab v. Robertson* (1897), App. Cas. 129; *Mayor, etc. v. Pickles* (1895), App. Cas. 597; *Wheelock v. Jacobs*, 40 Atl. Rep. 41 (Vt.); *Edwards v. Haeger*, 54 N. E. Rep. 176 (Ill.).

In Massachusetts if land be taken by a public board by right of eminent domain, it might be for park purposes or for any other public use, and the board draws off percolating water from a man's land, sometimes a remedy is given and sometimes it is not; the cases show that it depends upon the provisions of the statute under which the land is taken. *Trowbridge v. Brookline*, 144 Mass. 139, and cases cited in *Cabot v. Kingman*, 166 Mass. 405; *Furnace Co. v. Commonwealth*, 166 Mass. 480; *Sheldon v. Boston & Albany R. R.*, 172 Mass. 180.

<sup>4</sup> Gould on Waters (2d ed.) §§ 245, 281. See further, *Smith v. Brooklyn*, 46 N. Y. Supp. 141, and on appeal, 54 N. E. Rep. 787 (N. Y.).

<sup>5</sup> *Forbell v. City of New York*, 58 N. E. Rep. 644 (N. Y.).

ing station upon its land in the suburbs, to draw off percolating water and carry it to the city for consumption, as the effect was to dry up large tracts of land belonging to private individuals in the vicinity. Thus we see that there is some limit put upon the right to injure one's neighbors in the use of percolating water. Then again, inasmuch as a man can dry up his neighbor's well, it has been argued that there can be no remedy for polluting a neighbor's well by putting filth on one's own land, but the law is otherwise, as it ought to be.<sup>1</sup>

The title of a riparian owner upon the bank of a non-navigable stream runs to the thread of the stream, or, as it is expressed in law, "*usque ad medium filum aquæ*," and his right in the use of the water is subject to the rights of the public for boating.<sup>2</sup> But it is held in New Hampshire and Vermont that the public have no right to go fishing in a non-navigable stream.<sup>3</sup> If the course of a non-navigable stream changes by imperceptibly slow degrees, the title to the banks changes with the change in the course of the stream, or, as it is sometimes expressed, if the accretion or detrition be by slow and imperceptible degrees; but if the change in the course of the

<sup>1</sup> Gould on Waters (2d ed.) § 288; *Ballard v. Tomlinson*, 29 Ch. Div. 115.

<sup>2</sup> *Knight v. Wilder*, 2 Cush. 199; 2 Leake, 153; *Micklethwait v. Newlay Bridge Co.*, 33 Ch. Div. 133; *Ecroyd v. Coulthard* (1897), 2 Ch. 567, sustained on appeal in (1898), 2 Ch. 367. But see, as to the right of the public for boating, *Bourke v. Davis*, 44 Ch. Div. 110.

It is held in *Stanberry v. Mallory*, 39 S. W. Rep. 495 (Ky.) that if a disseisee owns to the thread of the stream, his disseisor acquires no title beyond the shore, unless by notorious acts of ownership he shows an intent to claim and hold to the middle of the stream.

See also 11 Harv. Law Rev. 130.

<sup>3</sup> *Beach v. Morgan*, 41 Atl. Rep. 349 (N. H.); *New England Club v. Mather*, 35 Atl. Rep. 323 (Vt.).

The public cannot acquire by prescription a right to fish in a non-tidal (English) river, even though it be navigable. *Smith v. Andrews*, (1891), 2 Ch. 678.

stream be by a violent action of nature, then the title to the land does not change.<sup>1</sup>

Next as to great ponds. In Masaachusetts a great pond is a pond having an area of more than ten acres. By the Colony ordinance of 1647, great ponds were made public property unless already appropriated to private use. The public, therefore, have the right to cut and carry away the ice, and to fish, fowl, and skate upon these ponds.<sup>2</sup> The public have no right to cross private land to enter upon great ponds, except that where there are no convenient means of access fishermen and hunters and possibly others may pass over wild land.<sup>3</sup> Now this right of the public in great ponds carries with it the right on the part of the legislature to confer upon a town or city the right to use the waters of a great pond for the domestic purposes of its inhabitants and for the extinguishment of fires; and though the riparian owners upon such ponds or upon their outlets may have established mills, so that the abstraction of the water is a serious damage to them, yet they have no remedy and are not entitled to damages, unless they have acquired a right by prescription or by grant from the state.<sup>4</sup> In *Atty. Gen. v. Revere Co.*,<sup>5</sup> we showed in a late chapter, that prescription was in that case grounded upon analogy to the statute of limitations and not upon the theory of a lost grant, because the right of a riparian owner, in that case upon an outlet of one of these

<sup>1</sup> *Hopkins Academy v. Dickinson*, 9 Cush. 544; 2 Leake, 154; *Hinderson v. Ashby* (1896), 1 Ch. 78.

<sup>2</sup> *Hittinger v. Eames*, 121 Mass. 546 *et seq.*; *Gage v. Steinkrauss*, 131 Mass. 222; *Slater v. Gunn*, 170 Mass. 509; *West Roxbury v. Stoddard*, 7 Allen, 158. See further as to great ponds in N. H., *Concord Mfg. Co. v. Robertson*, 25 Atl. Rep. 718 (N. H.); in Vt., *New England Club v. Mather*, 35 Atl. Rep. 323 (Vt.).

<sup>3</sup> *Slater v. Gunn*, 170 Mass. 515, 509.

<sup>4</sup> *Watuppa Co. v. Fall River*, 147 Mass. 548; *Proprietors v. Braintree Co.*, 149 Mass. 478; *Minneapolis Co. v. Commissioners*, 58 N. W. Rep. 33 (Minn.); *Auburn v. Union Co.*, 38 Atl. Rep. 561 (Me.).

<sup>5</sup> *Atty. Gen. v. Revere Co.*, 152 Mass. 444.

great ponds, to the supply of water to which the owner had been accustomed for more than twenty years, could not be restrained, and no lost grant could be inferred against the Commonwealth.

Now turning to navigable streams, at common law the title of a riparian owner upon tide water or upon the seashore extends only to high-water mark, but by various laws and usages in some of the states the common law has been changed. In England the distinction is drawn between tide water and water above the ebb and flow of the tide, so that in that country, even though a stream be navigable, if it be above the ebb and flow of the tide, the riparian owner owns to the thread of the stream. But the prevailing rule in this country is, that if the stream be navigable, even though above the ebb and flow of the tide, the riparian owner does not own to the thread of the stream.<sup>1</sup>

Easements are distinguished, a distinction taken from the civil law, as being positive or affirmative, and negative. An affirmative easement involves some act by the owner of the dominant tenement upon the servient tenement. A negative easement consists in some forbearance or restriction of the use of the servient tenement. An affirmative easement may involve the right to redress by legal process in behalf of the owner of the servient tenement. The right to discharge drainage over the servient tenement is an affirmative easement; the right to the flow of water through and from the servient tenement to the dominant tenement is a negative easement. A right of way is an affirmative easement; the transmission

<sup>1</sup> *Shively v. Bowlby*, 152 U. S. 1; *Sage v. Mayor, etc.*, 47 N. F. Rep. 1096, 1098 (N. Y.); *Lane v. Commissioners*, 40 Atl. Rep. 1058 (Conn.); *Revell v. People*, 52 N. E. Rep. 1052 (Ill.); *Mayor v. Sayre*, 45 Atl. Rep. 985 (N. J.); *Atty. Gen. v. Mayor*, 45 Atl. Rep. 995 (N. J.); *Freeland v. Penn. Co.*, 47 Atl. Rep. 746 (Penn.); *Ockerhausen v. Tyson*, 40 Atl. Rep. 1041 (Conn.). The Massachusetts Colony Ordinance of 1647 provided that the owner of land upon the seashore shall own to low-water mark, unless low-water mark be more than one hundred rods below high-water mark, in which case he shall own to the one hundred rod line.

and diffusion of noxious vapors over the servient tenement is an affirmative easement, and it cannot be effectually opposed by physical obstruction, and should it amount to an actionable nuisance, it can only be resisted by legal proceedings taken by the owner of the servient tenement. The right to support for buildings is an affirmative easement, because it involves a positive and continuous pressure upon the adjacent soil or building, and the constant use of the soil or building to resist the pressure. The passage of light to the dominant tenement, unobstructed by anything upon the servient tenement, is a negative easement.<sup>1</sup>

We will now consider the subject of the loss of an easement or profit. Professor Gray says<sup>2</sup> that in Massachusetts, New York, and Pennsylvania it has been held that an easement or profit created by deed cannot be extinguished by mere non-user, in contradistinction to an easement created by prescription, which it is said can be lost by non-user; but that it has never been decided in any of these states that an easement gained by prescription can be lost by mere non-user, nor has

<sup>1</sup> 2 Leake, 192, 193. Tudor includes under negative easements the right to support for buildings, and the right of party wall support. Tudor's Lead. Cases (3d ed.) 168, referred to by Mr. Budd in 4 Shars. & Budd, 125.

<sup>2</sup> 2 Gray's Cases on Prop. 390, note. See further, *Vinton v. Greene*, 158 Mass. 426; *Butterfield v. Reed*, 160 Mass. 361; *N. Y., etc. R. R. v. Benedict*, 169 Mass. 266, 267; *Jones on Easements*, §§ 847, 864; *Gas Company v. Fuller*, 170 Mass. 82; *Nichols v. Peck*, 39 Atl. Rep. 803 (Conn.); *Nichols v. Hutchinson*, 39 Atl. Rep. 803 (Conn.); *Howard v. Britton*, 41 Atl. Rep. 269 (N. H.); *Blood v. Millard*, 172 Mass. 65; *Ill. Cent. Ry. Co. v. Moore*, 43 N. E. Rep. 366 (Ill.); *Johnson v. Stitt*, 44 Atl. Rep. 513 (R. I.); *Bank v. Van Meter*, 45 Atl. Rep. 280 (N. J. Ch.); *Lewis v. N. Y., etc. R. R.*, 56 N. E. Rep. 541 (N. Y.); *Tabbutt v. Grant*, 47 Atl. Rep. 899 (Me.); *Gloucester Water Co. v. Gloucester*, 179 Mass. 365, 379; *Commissioners v. Hugo*, 10 App. Cas. 336; *Spottiswoode v. R. R.*, 40 Atl. Rep. 505 (N. J.); *Ill. Cent. Ry. Co. v. O'Connor*, 39 N. E. Rep. 563 (Ill.). For a queer English case touching abandonment of the land itself, see the commentary and criticisms by Challis in his 2d edition 81, note, and app. 395. The case is *Agency Co. v. Short*, 13 App. Cas. 793. See further, 3 Kerr, R. P. § 2276; 12 Law Quart. Rev. 248 *et seq.*; *Smith v. Lincoln*, 170 Mass. 489, 490.



it been held that an easement acquired by deed cannot be lost by abandonment without adverse possession. This brings us to the question of the loss of an easement by adverse user, which is a very different matter from these others. In *Butterfield v. Reed*,<sup>1</sup> there was an easement consisting of a right to flow land, which easement was acquired by deed. The owner of the servient estate had for more than twenty years cut hay upon the parcel in which the easement was claimed, and dug out muck, and had enlarged and used springs on the land; and for a portion of that time, less than twenty years, had enlarged a spring into which to lower milk to keep it cool. The court says that these acts were not adverse to, and did not infringe upon the rights of the owner of the easement, who had not exercised the right to flow the land for more than twenty years.

We now come to a very important practical principle which is this: If the owner of a dominant estate licenses the owner of the servient estate to extinguish the easement, and the owner of the servient estate executes the license by doing some act upon his land which defeats the further enjoyment of the easement, this extinguishes the easement;<sup>2</sup> for instance, suppose the easement be a right of way and suppose that the owner of the servient estate executes the license by ploughing over the way, and erecting a fence, or by erecting a building upon the place where the way ran. Now that easement is gone forever and yet the license may have been merely oral. Contrast this with the late case of *Hodgkins v. Farrington*<sup>3</sup> stated in a late chapter, in which there was an oral license to put a man's timbers into another man's wall and the license

<sup>1</sup> *Butterfield v. Reed*, 160 Mass. 362, 363, 369; *James v. Stevenson* (1893), App. Cas. 162; *Newcastle v. Haywood*, 44 Atl. Rep. 132 (N. H.); *Mason v. Horton*, 31 Atl. Rep. 292 (Vt.).

<sup>2</sup> *Dyer v. Sanford*, 9 Met. 395; *Morse v. Copeland*, 2 Gray, 302; *Warshauer v. Randall*, 109 Mass. 586; *Boston & Providence R. R. Co. v. Doherty* 154 Mass. 314.

<sup>3</sup> *Hodgkins v. Farrington*, 150 Mass. 19.

was executed by inserting the timbers in the wall, and yet the license was revocable at pleasure. But the point we are here considering is the converse or opposite of that, for here the license is by the owner of the dominant estate and is executed by the owner of the servient estate.

Unity of title of the dominant and servient estates will not extinguish an easement, unless the ownership be co-extensive; thus, the owning one in fee, and the other for a term of years, will not extinguish the easement; and so if a person owns one estate in severalty and a fractional part of the other, the easement is not extinguished.<sup>1</sup> If there be tenants in common of land, to which a right of way is appurtenant, the right of way is not merged or lost by a purchase by these tenants in common of the servient estate.<sup>2</sup>

<sup>1</sup> Jones on Easements, §§ 836, 852.

<sup>2</sup> Crocker v. Cotting, 170 Mass. 68; Tuttle v. Kilroa, 177 Mass. 146.

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